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Recommended Citation

17 Touro L. Rev. 249 (2000-2001).

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DISCRIMINATION AND BUSINESS REGULATION

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The cases discussed in this article cover a wide range of topics ranging from age discrimination claims to the constitutionality of a state law imposing sanctions on companies doing business with Burma, to a product liability claim against a car manufacturer for failure to install an airbag, to a negligence claim against a railroad for failure to install automatic gates at the railroad crossing and finally, to the authority of the FDA to regulate cigarettes. While these topics may appear entirely unrelated, what unites them is the continuing struggle to resolve assertions of power between the state and federal governments.

EMPLOYMENT DISCRIMINATION CASES

The United States Supreme Court decided two age discrimination cases last term. The first, *Kimel v. Florida Board of Regents*,² continues the exceedingly sharp five-to-four federalism clash in the Court, a clash that Linda Greenhouse has dubbed "one of the great divides in the Court's recent history."³ The case addresses the question of whether in passing the Age Discrimination in Employment Act, "ADEA",⁴ Congress validly abrogated the states' Eleventh Amendment immunity from suit.⁵ Seven of the nine circuits to address this issue had decided that the ADEA did validly override the states' Eleventh Amendment

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² 528 U.S. 62, 120 S. Ct. 631 (2000).

³ Linda Greenhouse, *Supreme Court Shields State From Lawsuits on Age Bias*, N.Y. TIMES, Jan. 12, 2000, at A1.

⁴ 29 U.S.C. §§ 621 *et. seq* (2000).

⁵ U.S. CONST. amend. XI, which states in pertinent part "The Judicial power of the United States shall not be construed to extend to a case between a state and a citizen of another state." *Id.*

immunity.⁶ However, the Supreme Court disagreed. Justice O'Connor, writing for the five-to-four majority,⁷ concluded that Congress lacked the constitutional power to subject state employers to age discrimination suits by private employees.⁸

The Court's analysis addressed two questions: first, whether Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity,⁹ and second, if it did, whether it was acting pursuant to a valid grant of constitutional authority.¹⁰

The Court had little trouble concluding that Congress manifested a clear intent to override the states' immunity.¹¹ When originally enacted in 1967, the ADEA specifically excluded state employers from coverage,¹² but that was changed in 1974, when the statute was amended to expand the definition of "employer" to include states and their political subdivisions or agencies and instrumentalities.¹³ The statute was also amended to authorize a civil action against a state employer.¹⁴ The plain language of the

⁶ *Kimel*, 120 S. Ct. 631, 639 (2000). The Supreme Court refers to eight circuits that have addressed the issue of whether the ADEA overrides the states' immunity. Seven of the circuits have held that the ADEA's abrogation of the states rights is constitutional. *Id.* (citing *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998) (upholding the validity of the ADEA abrogating the states immunity). *See also* *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998); *Goshtasby v. Board of Trustees of the University of Illinois* (7th Cir. 1998); *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1998); *Migneault v. Peck*, 158 F.3d 296 (10th Cir. 1998); *Kimel v. Board of Regents*, 137 F.3d 1426 (11th Cir. 1998). *But see* *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998) (the ADEA does not abrogate the states' Eleventh Amendment immunity).

⁷ *Id.* at 650.

⁸ *Id.* The Court notes that state employees may seek redress against state employees via state age discrimination statutes. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Kimel*, 120 S. Ct. at 640. "[T]he plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Id.*

¹² *Id.* at 637.

¹³ *Id.*

¹⁴ *Id.*

statute thus clearly evidenced Congress' intent to subject the States to suit for money damages.¹⁵

The far more difficult question in *Kimel* was whether Congress had the constitutional power to override the states' Eleventh Amendment immunity and subject them to suit. The Court had previously held, in *EEOC v. Wyoming*, that Congress had the power to pass the ADEA pursuant to its Commerce Clause power.¹⁶ However, that does not answer the Eleventh Amendment question because in 1996, in the landmark case of *Seminole Tribe v. Florida*,¹⁷ the Court held that when Congress acts pursuant to its Article I Commerce Clause power, it lacks the power to abrogate the states' sovereign immunity.¹⁸ That holding was explicitly reaffirmed by the Court last term in *Kimel*: "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."¹⁹ Thus, if the Commerce Clause is the only basis for Congress' enactment of the ADEA, then Congress cannot validly authorize an age discrimination suit brought by private individuals against their state employers.²⁰

The only constitutional basis for validly abrogating the states' sovereign immunity is Section 5 of the Fourteenth Amendment.²¹ Thus, the question becomes whether the ADEA is appropriate legislation under Section 5 of the Fourteenth Amendment.²²

This question requires a consideration of *City of Boerne v. Flores*,²³ a case discussed at this conference a few years ago. In *Boerne*, the Court provided an analyzed structure for distinguishing remedial legislation under Section 5 from unauthorized substantive redefinition of the Fourteenth

¹⁵ 29 U.S.C. §§ 621 *et seq.*

¹⁶ *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). The Court held that the ADEA was constitutional. *Id.*

¹⁷ 517 U.S. 44 (1996).

¹⁸ *Id.* at 47.

¹⁹ *Kimel*, 120 S. Ct. at 640.

²⁰ *Id.* at 643.

²¹ *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

²² U.S. CONST. amend. XIV, § 5.

²³ 521 U.S. 507 (1997).

Amendment.²⁴ The test requires “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²⁵

What does this congruence and proportionality test mean, how did the Court apply it to the ADEA and what does it bode for the future?

Applying the *Boerne* test, the Court in *Kimel* concluded that the requirements imposed under the ADEA on state employers were “disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.”²⁶ Under equal protection analysis, age discrimination claims do not trigger any form of heightened scrutiny. Rather they are analyzed under the highly deferential rational basis review test.²⁷ This is in sharp contrast to the ADEA, where the use of age as a basis for an employment decision is *prima facie* evidence of unlawful discrimination.²⁸ So, the ADEA makes unlawful far more state employment practices than would be found to be unconstitutional under rational basis review.²⁹ The ADEA is “so out of proportion to a supposed remedial or preventive object, so that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”³⁰

Having found that the “ADEA prohibits very little conduct likely to be held unconstitutional,” the Court proceeded to determine whether the Act was nevertheless an appropriate

²⁴ *Id.* at 519. The Court explains that Congress has the power to enforce a given constitutional right, Congress does not have the power to determine what constitutes a violation of that right. *Id.*

²⁵ *Id.* at 534. Under the “compelling interest” test States would be required to demonstrate that the methods used to achieve its interests are the least restrictive. *Id.*

²⁶ *Kimel*, 120 S. Ct. at 645.

²⁷ *Id.* at 645. The “rational basis” test merely requires that a State’s actions be related to an age based distinction. The correlation need not be shown to have “razorlike precision.” *Id.*

²⁸ 29 U.S.C. § 6231 (a)(1) (2000), stating in pertinent part, “It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” *Id.*

²⁹ *Kimel*, 120 S. Ct. at 647.

³⁰ *Id.*

prophylactic or remedial measure to address a particularly intractable problem.³¹ The Court found that such a problem did not exist.³² Congress had not identified a widespread pattern of age discrimination by the states.³³ Congress was not acting on a record of pervasive age discrimination practiced by the states. Although there are snippets of evidence and anecdotes about age discrimination by state agencies, the Court characterized the problem as “inconsequential” and insufficient to support Congress’ expansion of the ADEA to the states.³⁴ Since Congress had no basis to believe that “unconstitutional age discrimination had become a problem of national import,” it had no reason to believe that broad, prophylactic legislation was necessary.³⁵

Towards the end of the decision, the Court suggested that plaintiffs with age discrimination claims were not without a remedy due to the presence of state statutes prohibiting age discrimination. For example, in New York, the Human Rights Law at Section 296 prohibits age discrimination in employment.³⁶ However, it should be noted that the remedies offered are not identical under the two statutes. For example, the federal statute authorizes attorneys’ fees, and attorneys’ fees are not available under New York State Human Rights Law. Another significant difference relates to damages. The federal age discrimination statute authorizes ‘double damages’ for willful violations, while a similar remedy is not available under New York law.³⁷

Justice Stevens authored a vigorous dissent, joined by Justices Souter, Ginsburg, and Breyer.³⁸ This dissent does not

³¹ *Id.* at 639.

³² *Id.* at 649.

³³ *Id.* at 645. The Court has addressed unconstitutional age claims under the Equal Protection Clause three times. In each case the Court determined that the discrimination was not prohibited by the Equal Protection Clause. *Id.*

³⁴ *Kimel*, 120 S. Ct at 645.

³⁵ *Id.* “Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.” *Id.*

³⁶ N.Y. EXEC LAW § 290 (1999), provides in pertinent part, “The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity . . . to eliminate and prevent discrimination in employment.” *Id.*

⁵⁰ *Id.* (The language of the statute does not make any provision for ‘double damages’, even in cases of willful discrimination).

³⁸ *Kimel*, 120 S. Ct. at 650 (Stevens, J. dissenting).

mince words. The dissenting Justices believe that the Court's recent Eleventh Amendment jurisprudence is simply all wrong.³⁹ The dissent characterizes *Seminole Tribe v. Florida* as "so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court."⁴⁰ "The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."⁴¹

This issue will be back before the Court this term in the context of an ADA case. The Court has accepted *Garrett v. University of Alabama Birmingham Board of Trustees*,⁴² a case raising the same issue in the context of disability discrimination. The Eleventh Circuit in *Garrett*, upheld the ADA as applied to the states⁴³, as have the Second Circuit and the Ninth Circuit even post-*Kimel*.⁴⁴ This case is theoretically distinguishable from the age discrimination case for at least two reasons. First, the record in *Garret* is significantly stronger with respect to evidence of discrimination on the basis of disability.⁴⁵ Second, it may be argued that disability claims may warrant something more searching than rational basis review. Whether those distinctions

³⁹ *Id.* at 652-53, "The Eleventh Amendment simply does not support the Court's view Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the Court treats as though it were a constitutional precept." *Id.*

⁴⁰ *Id.* at 650.

⁴¹ *Id.*

⁴² *Garrett v. University of Alabama Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999).

⁴³ *Id.*

⁴⁴ See, e.g., *Leiman v. New York*, 2000 U.S. Dist. LEXIS 13586 (2d Cir. 2000) (holding that plaintiff's claim that she was forced to retire from her job in violation of the Age Discrimination in Employment Act was barred by U.S. Const. amend XI since the state did not explicitly waive its immunity from suit); See also *Howard v. Regents of University of California*, 2000 U.S. Dist. LEXIS 5074 (9th Cir. 2000) (holding that defendant was entitled to summary judgement due to Eleventh Amendment immunity from Age Discrimination in Employment Act suit).

⁴⁵ *Garrett v. The Board of Trustees of the University of Alabama in Birmingham*, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998).

mean the case will be decided differently from *Kimel* remains to be seen.⁴⁶

The second age discrimination case of last term, *Reeves v. Sanderson Plumbing Products*,⁴⁷ is very important because it helps to clarify how one goes about proving a discrimination claim based on indirect or circumstantial evidence. The heart of an employment discrimination claim is that the employer is treating an employee less favorably because of the employee's membership in a protected group. These claims require the plaintiff to prove intentional discrimination by the employer, which can be done by direct evidence or, far more commonly, by indirect or circumstantial evidence.⁴⁸ When the court analyzes an indirect evidence case, it uses a three-step analysis suggested by the Supreme Court in *McDonnell Douglas Corp. v. Green*.⁴⁹ First, the plaintiff must establish a *prima facie* case of discrimination by his or her employer. Under *McDonnell Douglas*, a plaintiff makes out

⁴⁶ As this article went to press, the Supreme Court decided *University of Alabama v. Garrett*, holding that Congress did not have the power to override the states' immunity with respect to the Americans with Disabilities Act. See *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001).

⁴⁷ 120 S. Ct. 2097 (2000). Reeves filed suit contending that he had been fired because of his age, in violation of the Age Discrimination in Employment Act. Reeves was employed by defendant's manufacturing company for 40 years. He worked in the "hinge room," where his responsibilities included recording the attendance of those who worked on the "regular line" under his supervision. In 1995, the director of manufacturing reported to company officials that production in the hinge room was falling due to absent and late employees. Following an audit of the hinge room, Reeves was discharged and he filed suit against Sanderson Plumbing Products Incorporated. *Id.*

⁴⁸ *Reeves*, 120 S. Ct. at 2105 (citing *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983)). The Court recognized that the question facing the triers of fact in discrimination cases with respect to liability is difficult, and that "there will seldom be eyewitness testimony as to the employer's mental processes". As a result the Court's have employed a framework articulated in *McDonnell Douglas* to analyze ADEA claims that are primarily based on circumstantial evidence. *Id.*

⁴⁹ 411 U.S. 792 (1973). See *Reeves*, 120 S. Ct. at 2106 (referring to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (2000), establishing a systematic approach for the burden of production and an order for the presentation of proof). See also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

a *prima facie* case (which in this context means a rebuttable presumption) by proving four elements:

- 1) that plaintiff is a member of a protected class;
- 2) that plaintiff applied for and was qualified for a job for which the employer was seeking applicants;
- 3) that despite plaintiff's qualifications, plaintiff was rejected; and
- 4) that the rejection occurred under circumstances that give rise to an inference of discrimination, as when someone from outside the protected group was hired or when the position remained open and the employer continued to interview persons who had the plaintiff's qualifications.⁵⁰ (The fact that the replacement is a member of the protected class does not necessarily defeat the claim. However, in age discrimination cases, modest age disparities are obviously unlikely to suffice.)

Satisfying the above four criteria makes out a *prima facie* case.

Second, once the plaintiff makes out a *prima facie* case, the burden shifts to the employer who must come forward with a legitimate, nondiscriminatory reason for the employee's rejection.⁵¹ The employer's burden here is the burden of production. The burden of persuasion remains at all times with the plaintiff in a disparate treatment case.

Third, the employee then has the burden of demonstrating, by a preponderance of the evidence, that the legitimate reasons articulated by the employer were not its true reasons, but rather, a pretext for discrimination.⁵²

In *Reeves*, the question before the Court was whether in a circumstantial evidence case, a plaintiff's *prima facie* case of discrimination, coupled with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its action, was adequate to sustain a finding of liability for

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* See *Reeves*, 120 S. Ct. at 2106. (stating that after the employer comes forth with sufficient evidence to show that his decision to terminate the employee was nondiscriminatory, the employee must be given an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer was a mere pretext for discrimination and is not deserving of belief).

intentional discrimination.⁵³ Expressed differently, the issue is whether plaintiff must do more than establish a *prima facie* case, and prove that the employer's reason was false.⁵⁴ Is "pretext-plus" required?

Roger Reeves was fifty-seven years old when he was fired from a position as supervisor for a plumbing company where he had worked for forty years. He had no trouble establishing a *prima facie* case under the ADEA⁵⁵. He was a member of a "protected group" since he was over forty years of age, he was qualified for the position of supervisor, he was fired, and he was replaced by a considerably younger person.⁵⁶

Having established a *prima facie* case, the burden of production shifted to his employer to articulate a legitimate, non-discriminatory reason for firing him.⁵⁷ The employer claimed that Reeves was fired, not because of his age, but rather he failed to properly supervise the time records of his subordinates.⁵⁸ At trial, Reeves testified that he had, in fact, accurately maintained the time records.⁵⁹ The case went to the jury, who returned a verdict in Reeves' favor.⁶⁰

⁵³ *Reeves*, 120 S. Ct. at 2104-05. The Court granted certiorari, "to resolve a conflict among the Courts of Appeals as to whether a plaintiff's *prima facie* case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* See 29 U.S.C. § 623 (2000). This provision states in pertinent part: "[I]t is unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.*

⁵⁶ *Reeves*, 120 S. Ct. at 2103.

⁵⁷ *Id.* at 2103-05.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2107. In response to Sanderson Plumbing's claim that Reeves failed to properly supervise employees, Reeves established that Sanderson's explanation was false, through evidence of his accuracy in maintaining attendance records by showing that the automated time clock, in which the employees punched in, often malfunctioned. Reeves also testified that his job description did not include disciplining late employees. Moreover, Reeves stated that on occasions where employees were paid for hours they did not work, the company simply adjusted those employee's next paychecks to remedy the errors. Additionally,

The Fifth Circuit reversed, holding that Reeves' *prima facie* claim, coupled with evidence that the employer's reason was false, was not sufficient to warrant a finding of unlawful discrimination.⁶¹ Rather, Reeves was required to present independent evidence of unlawful discrimination.⁶²

In *St. Mary's Honor Center v. Hicks*,⁶³ the Court held that the rejection by the fact finder of the employer's proffered nondiscriminatory reason did not compel judgment for the plaintiff. In other words, the plaintiff does not automatically win if a fact finder determines that the employer was lying about the reason for the adverse employment decision.⁶⁴ *St. Mary's*⁶⁵ asked the "must" question; *Reeves*⁶⁶ asked the "may" question. In other

on the day Reeves was fired, he was told by his employer that his discharge was due to his failure to report one absent employee on two separate days in September, whereby on those days Reeves was in the hospital and not at work. Reeves also introduced evidence that the head of Sanderson (Reeves' boss) had directed derogatory, age based comments at Reeves. *Id.*

⁶⁰ *Id.* at 2103. The jury found in favor of Reeves and awarded him \$35,000 in compensatory damages, and found that Sanderson's age discrimination had been willful and the District Court entered judgment for \$70,000. *Id.*

⁶¹ *Reeves v Sanderson Plumbing Products*, 180 F.3d 263 (5th Cir. 1999).

⁶² *Id.* The reversal by the Court of Appeals was based on a finding Reeves had not introduced enough evidence "to sustain the jury's finding of unlawful discrimination." The court further noted that Reeves "very well may" have introduced facts and evidence whereby a reasonable jury could have found that Sanderson's proffered explanation for discharging Reeves was pretextual. However, the court held that a *prima facie* case of discrimination, together with sufficient evidence for the jury to disbelieve the employer's legitimate, nondiscriminatory reason for discharge, was "not dispositive" of the main issue of "whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *See Reeves*, 120 S. Ct. at 2104.

⁶³ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

⁶⁴ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Plaintiff brought suit against his employer, St. Mary's, alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). The district court found in favor of St. Mary's. The United States Court of Appeals reversed holding that Hicks was entitled to judgement as a matter of law upon proof that all of St. Mary's proffered reasons were pretextual. The Supreme Court stressed that they do not have the authority to subject an employer to liability for alleged discriminatory employment practices unless determined by an appropriate factfinder that the employer has unlawfully discriminated. *Id.*

⁶⁵ *St. Mary's Honor Center*, 509 U.S. 502 (1993).

⁶⁶ *Reeves v. Sanderson Plumbing Products*, 120 S. Ct. 2097 (2000).

words, *may* the fact finder conclude that it was unlawful discrimination when it determines that the employer's articulated reason was false? The Court's unanimous answer, with Justice O'Connor writing for the Court, was yes.⁶⁷ The Court employed a common sense approach, noting that the most likely explanation for an employer lying is that the employer is masking unlawful discrimination.⁶⁸ The Court notes that it is quite reasonable for a jury to infer "from the falsity of an employer's explanation that the employer is dissembling to cover up a discriminatory purpose."⁶⁹ Further, once you reject the employer's explanation, "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."⁷⁰

Thus, the holding in *Reeves* is that "a plaintiff's *prima facie* case, combined with sufficient evidence to allow the fact finder to reject the employer's articulated reason as false, permits the trier of fact to conclude that the employer unlawfully discriminated."⁷¹

⁶⁷ *Id.* at 2111-12. In determining whether Reeves was the victim of intentional discrimination on the basis of his age, the Court examined the record in favor of Reeves, and found that Reeves was required to show by a preponderance of the evidence that his age was a determining factor in the decision of Sanderson to terminate him. The district court instructed the jury that, to show that Sanderson's explanation was a pretext for discrimination, Reeves had to offer evidence to demonstrate, first, that the reasons stated by Sanderson were not the real reasons for his discharge, and second, that age discrimination was the real reason for his discharge. Since Reeves established a *prima facie* case of discrimination, through sufficient evidence for the jury to reject Sanderson's explanation, and since Reeves introduced additional evidence of animosity based on his age, the Supreme Court over turned the verdict of the Court of Appeals and held that there was sufficient evidence to find that Sanderson intentionally discriminated, thus it was proper for the district court to submit the case to the jury superior to the motion for judgement as a matter of law made by Sanderson. *Id.*

⁶⁸ *See Reeves*, 120 S. Ct. at 2109. "When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration." *Id.*

⁶⁹ *Id.* at 2108. (The Court noted that, such an inference by the jury, is consistent with the principal of evidence law, that the finder of fact is permitted to consider the dishonesty of a party as to a material fact as "affirmative evidence of guilt") (*quoting Wright v. West*, 505 U.S. 277 (1992)).

⁷⁰ *Id.* at 2108-09.

⁷¹ *Id.* at 2109.

However, this does not mean that such a showing will always be adequate to support a jury finding of liability.⁷² Where the plaintiff's evidence of pretext is weak, where the evidence suggests that the employer's explanation was a pretext for something other than discrimination, and where there is abundant evidence that no discrimination occurred, the employer would be entitled to judgment as a matter of law.⁷³

Reeves is a real victory for employment discrimination claimants, and is not limited to age discrimination claims.⁷⁴ Reeves provides the methodology whether it is race, age, sex or disability discrimination.⁷⁵ Further, Reeves is likely to be followed by state courts analyzing state law discrimination claims because the courts follow the same methodology, order of proof, presentation of proof and burdens as the federal court.⁷⁶ Thus, the decision is likely to be applied in New York State under the New York State Human Rights Law.⁷⁷

PREEMPTION DECISIONS

The Court decided several preemption cases last term and these decisions, surprisingly, do not fit the pattern that has otherwise emerged in the last several years through interpretation of the Tenth amendment,⁷⁸ the Eleventh Amendment,⁷⁹ and Section 5 of the Fourteenth Amendment.⁸⁰ The shift of power to the states that emerged in the federalism cases was not the result in the preemption cases of last term, where in each case the Court found the state law to be preempted. In case after case, the Court

⁷² Reeves, 120 S. Ct. at 2109.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ U.S. CONST. amend. X, states in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved are reserved to the states respectively, or to the people." *Id.*

⁷⁹ U.S. CONST. amend XI, states in pertinent part: "[t]he judicial power of the United States shall not be construed to extended to a case between a state and a citizen of another state." *Id.*

⁸⁰ U.S. CONST. amend XIV § 5. This section provides that "Congress shall have power to enforce, by appropriate legislation the provisions of this article". *Id.*

has said that the touchstone of preemption is congressional intent. That intent may be manifested either expressly or impliedly. Implied preemption occurs when Congress regulates so pervasively that it is said to occupy the field, which is referred to as field preemption⁸¹ Furthermore, implied preemption can also be accomplished through conflict preemption, where it is impossible to comply with both state and federal laws, or where the state law frustrates the objectives of the federal law.⁸² Once the Court determines that Congress intended to preempt state action, the Supremacy Clause instructs that the state law is invalid.

The most interesting of the preemption cases last term was *Crosby v. National Foreign Trade Council*.⁸³ This case involves Burma, renamed Myanmar in 1989. (The Supreme Court explained that its use of the name Burma instead of Myanmar was not meant to express any political view,⁸⁴ and I issue the same disclaimer.) The issue in the case was the validity under the Supremacy Clause of a state statute that imposed sanctions on companies doing business with Burma.⁸⁵ In 1996, Massachusetts adopted a law that, subject to a few limited exceptions, imposed

⁸¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLE AND POLICIES 291-92 (1997). The Supreme Court will find field preemption if a federal regulation shows the intentions of Congress that by enacting such a comprehensive federal law such law will be exclusive in a particular area and completely occupy the field. *See also* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The Court has stated that “[a]bsent explicit preemptive language, ‘Congress’ intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Id.*

⁸² CHERMERINSKY, *supra* note 102, at 297-98. A person cannot comply with both federal and state law at the same time since federal law and state law is mutually exclusive. If the two laws are in conflict, state law is preempted by state law. *Id.*

⁸³ 120 S. Ct. 2288 (2000).

⁸⁴ *Id.* at 2291 n.1. The Court stated:

The Court of Appeals noted that the ruling military government of “Burma changed [the country’s] name to Myanmar in 1989,” but the court then said it would use the name Burma since both parties and amici curiae, the state law, and the federal law all do so . . . We follow suit, noting that our use of this term, like the First Circuit’s, is not intended to express any political view.

Id.

⁸⁵ *Id.* at 2291.

such sanctions.⁸⁶ Besides Massachusetts, Vermont was the only state to adopt this type of law, but there were nineteen municipalities that adopted a Burma law, including New York City.⁸⁷

Three months after the Massachusetts law was passed, Congress passed the Burma Act, imposing its own set of sanctions on Burma.⁸⁸ The National Foreign Trade Counsel, consisting of members with business ties to Burma, challenged the Massachusetts law.⁸⁹ The federal district court invalidated the law and the First Circuit affirmed, on three independent grounds: 1) that the state law interfered with the foreign affairs power of the national government, 2) that the law violated the dormant Foreign Commerce Clause, and 3) that the state law was preempted by the federal Burma Act.⁹⁰

The Supreme Court unanimously held that the Massachusetts law was preempted by the Federal Burma Law, because the state law stood as an obstacle to the accomplishment of Congress' objectives under the federal Act.⁹¹ However, the Court did not reach the foreign affairs question or the dormant commerce clause issue.⁹² Writing for the Court, Justice Souter concluded that the state law conflicted with the federal law because it frustrated the purposes of three provisions of the Burma Law: first its delegation of discretion to the President to control economic sanctions against Burma; second, its limitation of sanctions solely to United States persons and new investment; and third, its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.⁹³

With respect to Presidential discretion, the Court noted that when Congress gives the President direct authority to act in foreign

⁸⁶ MASS GEN LAWS § 7:226- 7:22 (1997). “

⁸⁷ *Crosby*, 120 S. Ct. at 2293.

⁸⁸ Foreign Operations, Exporting, Financing and Related Programs Appropriations Act, 1997 §570, 110 Stat 3009-166 to 3009-167.

⁸⁹ *Crosby*, 120 S. Ct. at 2293.

⁹⁰ *Natsios*, 181 F.3d at 43.

⁹¹ *Crosby*, 120 S. Ct. at 2293.

⁹² *Id.* at 2294.

⁹³ *Id.* at 2293.

affairs, the President's authority is at its maximum.⁹⁴ The Court stated "the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of executive authority that we think controls the issue of preemption here."⁹⁵ The Massachusetts law, by imposing unconditional, immediate and automatic sanctions on Burma thus undermines the more nuanced approach utilized in the federal law that gives the President some discretion with respect to imposing or withholding full sanctions. According to the Court, the Massachusetts law, if enforced, would tie the President's hands and he would have less economic and diplomatic leverage in dealing with Burma.⁹⁶ Further, the Massachusetts law would prevent the President from speaking for the country with one unified voice and would impede his ability to develop a comprehensive strategy to bring democracy to Burma and improve human rights practices there.⁹⁷ The Court's finding was strengthened by the reaction of some of our allies who filed formal protests against Massachusetts' adoption its Burma law.⁹⁸

Defenders of the Massachusetts law argued that there is no conflict preemption because the two laws have the same purpose: to bring democracy to Burma and prevent human rights abuses. The defenders also argued that Congress knew about the Massachusetts law when it passed its Burma Law, yet failed to expressly preempt the state law.⁹⁹ Finally, the defenders pointed to the boycott measures that were enacted by localities and the states in the South Africa apartheid era,¹⁰⁰ arguing that those laws should serve as a precedent. The Court, however, rejected all of these arguments.¹⁰¹ The fact that the state law and the federal law share

⁹⁴ *Id.* at 2295.

⁹⁵ *Id.* at 2296.

⁹⁶ *Id.*

⁹⁷ *Crosby*, 120 S. Ct. at 2298.

⁹⁸ *Id.* at 2299. For example, the European Union warned that the Massachusetts law would have a damaging effect on bilateral European Union and United States relations. Japan went so far as to file a formal complaint in the World Trade Organization. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Crosby*, 120 S. Ct. at 2302.

¹⁰¹ *Id.*

a common purpose, does not remove the conflict in the means employed by the two laws.¹⁰² The fact that there were local sanctions against South Africa does not serve as a precedent because the Supreme Court never had the opportunity to rule on whether those laws were preempted.¹⁰³

In reading this case, one may well question why Congress is not required to expressly articulate its intent to preempt?. If Congress has the power to preempt, why not simply require Congress to expressly announce that intent, or, at least, utilize a presumption against preemption? In a footnote, the Court simply stated "We leave for another day a consideration . . . of a presumption against preemption."¹⁰⁴ Some years ago, a bill was introduced in both houses of Congress prescribing there would be no preemption of state or local law if Congress did not expressly state its intent to preempt, or unless there was a direct conflict between the two.¹⁰⁵ As far as I know, there has been little movement to secure passage of such a bill.

There is a concurrence in the case written by Justice Scalia and joined by Justice Thomas. They write to chastise their colleagues for unnecessarily relying on legislative history. Scalia states:

Neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor), nor Executive statements and letters addressed to congressional committees, nor the non-enactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us.¹⁰⁶ The *only* reliable indication of *that* intent – the only thing we know for sure can be attributed to *all* of them – is the words of the bill that they voted to make law. In a way, using unreliable legislative history to confirm what the statute plainly says anyway . . . is less objectionable

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2294 n.8.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2302 (Scalia, J., concurring).

since, after all, it has absolutely no effect upon the outcome. But in a way, this utter lack of necessity makes it even worse – calling to mind St. Augustine's enormous remorse at stealing pears when he was not even hungry, and just for the devil of it not seeking aught through the shame, but the shame itself!¹⁰⁷

What is the effect of this decision on other local sanction laws? The decision in the *Burma* case was targeted at rather specific conflicts between two laws that utilized very different approaches. The decision is targeted at rather specific conflicts between two laws that utilize very different approaches. It did not announce any broad prohibition against states or localities venturing into the foreign policy domain, which means that it is conceivable that, in other contexts, other boycott measures may survive.

The railroad case, *Norfolk Southern Railway v. Shanklin*,¹⁰⁸ is another preemption case. In a seven-to-two opinion, the Court held that a railroad could not be sued for negligence where a state has used federal money to install a federally approved warning device at a railroad crossing.¹⁰⁹

The next preemption case *Geier v. American Honda Motor Co.*,¹¹⁰ asks whether a federal law preempted a design defect claim brought by a motorist who sustained serious injuries when her 1987 Honda Accord, which was equipped with a seat belt but not an airbag, spun out of control and hit a tree.¹¹¹ Many state courts, including New York in *Drattel v. Toyota Motor Corp.*¹¹² had permitted the product liability claim to proceed, finding no preemption.¹¹³ At least five federal courts of appeals had reached

¹⁰⁷ *Id.* at 2304 (Scalia, J., concurring).

¹⁰⁸ 529 U.S.344 (2000).

¹⁰⁹ *Id.*

¹¹⁰ 120 S. Ct. 1913 (2000).

¹¹¹ *Id.* at 1917.

¹¹² *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 699 N.E.2d 376, 677 N.Y.S.2d 17 (1998).

¹¹³ See, *Minton v. Honda of America Mfg., Inc.*, 80 Ohio St. 3d 62, 684 N.E.2d 648 (1997); *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114 (1997); *Wilson v.*

the contrary conclusion.¹¹⁴ At least five Circuit Courts of Appeals have reached the opposite conclusion.¹¹⁵

The Supreme Court, with Justice Breyer writing for a sharply divided court, found that an automobile manufacturer cannot be sued for negligence or strict products liability for failing to have an airbag before federal law required all cars to have airbags.¹¹⁶ The Court found the tort claim was preempted by a regulation promulgated by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act.¹¹⁷ The statute had an express saving clause that said it should not be applied to preempt a state law tort action.¹¹⁸ But this did not prevent the Court from conducting a conflict preemption analysis. The Court said that the design defect claim, the tort claim, conflicts with a federal regulation regarding passive restraints.¹¹⁹ The regulation first mandated manual seatbelts. Once it became clear that people were not using mandatory seat belts, the government began exploring passive restraints.¹²⁰ A series of regulations were issued over the years about different kinds of passive restraint systems.¹²¹ Finally in 1984, the regulation at issue in this case was passed, which was a phased-in requirement – not of air bags – but of some form of passive restraint.¹²² It could be an automatic seat belt, air bags or some other developing technology that would be considered a passive restraint. The regulation was made effective

Pleasant, 660 N.E.2d 327 (Ind. App. 1995); *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345 (1995).

¹¹⁴ See, e.g. *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988).

¹¹⁵ See, e.g. *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988).

¹¹⁶ *Geier*, 120 S. Ct. at 1927-8.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1919. The saving clause stated: "compliance with a federal safety standard does not exempt any person from any liability under common law." *Id.*

¹¹⁹ *Id.* at 1922.

¹²⁰ 15 U.S.C. § 1381 (1966) (repealed 1994).

¹²¹ *Id.*

¹²² *Geier*, 120 S. Ct. at 1924.

in model year 1987, but in that year the manufacturers only had to comply with it in ten percent of their cars.

Honda, who was the defendant in this case, did comply with that requirement, but the car that Mrs. Geier was driving was not one of those ten percent.¹²³ Her car had a seat belt, not an air bag nor any other form of passive restraint.¹²⁴ The question raised was whether her design defect claim against Honda was preempted by the regulation. The Court held that the claim was preempted, because the tort claim would stand as an obstacle to the variety and mix of devices that the federal regulations sought.¹²⁵ The Court said the federal government had purposefully and deliberately opted for a phased-in requirement that permitted a choice of different passive restraint systems.¹²⁶ The federal government decided that doing this over time was important to slowly bring about public acceptance, and to permit time to collect data about the efficiency of different restraint systems.¹²⁷ According to the majority, the imposition of tort liability would conflict with the federal objectives.

Justice Stevens, writing in dissent, and joined by Justices Souter, Thomas and Ginsburg, characterized the majority holding as an “unprecedented extension of the doctrine of preemption.”¹²⁸ Justice Stevens says “this is a case about federalism, that is, about respect for the constitutional role of the States as sovereign entities.”¹²⁹ The dissenters concluded that the federal objectives “would not be frustrated one whit by allowing state courts to determine whether in 1987 the life-saving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars.”¹³⁰

The last case to be discussed, *FDA v. Brown & Williamson Tobacco Corp.*,¹³¹ is not a preemption case, but it is similar to the preemption cases, in that it too turns on congressional intent. Also,

¹²³ *Id.* at 1930.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1928.

¹²⁶ *Geier*, 120 S. Ct. at 1916.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1928 (Stevens, J., dissenting).

¹²⁹ *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

¹³⁰ *Id.* at 1930.

¹³¹ 529 U.S. 120, 120 S. Ct. 1291 (2000).

like *Geier* above, this case plays out against the backdrop of a private powerful industry lobbying vigorously against government regulation. Here it is not the automobile manufacturers, it is the tobacco industry. The tobacco industry won a clear victory in *FDA v. Brown*,¹³² where the Court held that the FDA lacked the authority to regulate tobacco products.¹³³ Whether the tobacco industry winds up winning the war and not just this particular battle is far from clear.

The key event took place in 1996, when the FDA reversed a ten year-old policy and announced that it *did* in fact have the authority to regulate tobacco products.¹³⁴ With Dr. David Kessler, now Dean of Yale Medical School, as Commissioner, the agency determined that nicotine was a drug within the meaning of the Food, Drug, and Cosmetic Act and cigarettes are combination products that deliver nicotine to the body.¹³⁵ Pursuant to its authority to regulate drugs and drug delivery devices, the agency promulgated a series of restrictions that were targeted at advertising and marketing practices aimed at young people,¹³⁶ in the hope of reducing tobacco addiction among children and adolescents. The agency believed that the best way to deal with the problem was to try to prevent sales to people under eighteen, because that is when the addiction starts.¹³⁷ The regulations restricted the sale, distribution and advertising of tobacco products to young people,¹³⁸ as for example, prohibiting sales to persons under eighteen, requiring photo identification, prohibiting free samples, prohibiting vending machines except in adult-only locations, restricting advertising to black and white text only format unless the advertisement only reaches adults, prohibiting outdoor advertising near a school or playground, and prohibiting manufacturers from sponsoring certain athletic and cultural events.

¹³² 529 U.S. 120, 120 S. Ct. 1291 (2000).

¹³³ *Id.* at 1316.

¹³⁴ *Id.* at 1296.

¹³⁵ *FDA*, 120 S. Ct. at 1297.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

The regulations were challenged and with Justice O'Connor writing for a five-to-four majority,¹³⁹ the Court held that the FDA lacked that authority to regulate tobacco.¹⁴⁰ The Court was very blunt in acknowledging that smoking is a serious public health hazard.¹⁴¹ The majority was also blunt in its recognition of the special status that the tobacco industry has in this country. The Supreme Court, with Justice O'Connor writing for yet another five-to-four majority, acknowledged that "this is hardly an ordinary case . . . [it] involve[s] an industry constituting a significant portion of the American economy . . . [which holds] a unique place in American history and society, tobacco has its own unique political history."¹⁴² The Court reviewed the decades of congressional action and noted that on at least six different occasions, Congress legislated in the area of tobacco products.¹⁴³ Congress legislated with respect to advertising tobacco and labeling tobacco, but stopped short of banning the product. The Court interpreted this history as evidencing Congress' intent not to ban cigarette products.¹⁴⁴ "For better or worse" the Court said, "Congress has created a distinct regulatory scheme for tobacco products rejecting proposals to give the FDA or any other agency significant policy-making authority."¹⁴⁵

¹³⁹ Justice O'Connor, delivered the decision of the Court, in which Rehnquist, C.J., Scalia, Kennedy and Thomas, JJ. joined.

¹⁴⁰ FDA, 120 S. Ct. at 1296.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1315.

¹⁴³ *Id.* at 1295. Since 1965, Congress has enacted six separate statutes addressing the problems of tobacco use. These statutes are: 15 U.S.C. §§ 1331, 1333 and 4402, (which require that health warnings appear on all packaging and in all print and outdoor advertisements); §§ 1335, 4402(f), (which prohibit the advertising of tobacco products through any electronic communication medium regulated by the Federal Communications Commission); 42 U.S.C. § 290aa-2(b)(2), (requiring the Secretary of Health and Human Services to report every three years to Congress on research findings concerning the addictive property of tobacco); and § 300x-26(a)(1), (making States' receipt of certain federal block grants contingent on their prohibiting any tobacco product manufacturer, retailer, or distributor from selling or distributing any such product to individuals under age 18). *Id.*

¹⁴⁴ FDA, 120 S. Ct. at 1295.

¹⁴⁵ *Id.*

One interesting argument made in the case relates to the FDA's power to determine whether a drug is safe. Since 1996, the FDA has determined that tobacco products are not safe. According to the majority, that means the FDA has to ban cigarettes from the market, yet the FDA has not issued a ban.¹⁴⁶ Thus, according to the majority the FDA's action is not consistent with its charge under the relevant statutes.¹⁴⁷

There is a dissent in the case authored by Justice Breyer,¹⁴⁸ who concludes that since the legislative record is unclear, the Court should utilize traditional administrative law rules of construction. These rules of construction require deference to the agency. The dissent says:

... the upshot is that the Court today holds that a regulatory statute aimed at unsafe drugs and devices does not authorize regulation of a drug (nicotine) and a device (a cigarette) that the Court itself finds unsafe. Far more than most, this particular drug and device risks the life-threatening harms that administrative regulation seeks to rectify. The majority's conclusion is counterintuitive.¹⁴⁹

The decision is unlikely to be the last word on the subject. Dr. David Kessler was quoted as indicating that in some ways the decision advances the cause because of its recognition of the dangers caused by cigarettes.¹⁵⁰ President Clinton called on Congress to explicitly give the FDA authority to regulate tobacco products.¹⁵¹ Presidential candidate Al Gore took a similar position. On May 7th then presidential candidate, George W. Bush said that Congress ought to give the FDA authority to discourage teenage smoking.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ *See*, 21 U.S.C. § 301 et seq.

¹⁴⁸ Justice BREYER, probably the Justice with the most background in administrative law, delivered the dissent of the court, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join.

¹⁴⁹ *FDA*, 120 S. Ct. at 1331.

¹⁵⁰ Linda Greenhouse, *High Court Holds F.D.A. Can't Impose Rules on Tobacco*, N.Y. TIMES, March 22, 2000 at A1.

¹⁵¹ *Id.*

¹⁵² Al Cross, *Bushes Get Southern Welcome: Texas Governor, ex-president visit the Derby*, The Courier (Kentucky), May 7, 2000 at 1b.