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Discrimination Cases in the 2000 Term

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DISCRIMINATION CASES IN THE 2000 TERM

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The Court decided several civil rights cases last term, covering a range of issues affecting discrimination claimants in employment, public accommodations and federally funded programs and activities. The decisions ranged in complexity, in significance and in the Court's ability to agree: two cases produced unanimous decisions;[2] one was decided seven to two;[3] and two produced what has now become the familiar five to four acrimonious split on the Court.[4]

Alexander v. Sandoval.

By far, the most important of the civil rights cases decided last term is *Alexander v. Sandoval*,[5] where the Court held that there is not a private right of action under Title VI in cases of disparate impact discrimination.[6] Title VI prohibits discrimination on the basis of race or national origin in all federally funded programs.[7] Pursuant to § 602 of the Act, which authorizes federal agencies to promulgate implementing

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[2] Pollard v. E.I. Du Pont, 532 U.S. 843 (2001); Clark v. County of Breeden, 532 U.S. 268 (2001).

[3] P.G.A. Tour, Inc. v. Martin, 532 U.S. 661(2001).

[4] Alexander v. Sandoval, 532 U.S. 275 (2001); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[5] *Alexander,* 532 U.S. at 275.

[6] *Id.*

[7] 42 U.S.C. § 2000d (1994). Title VI of the Civil Rights Act of 1964, 78 Stat. 252 (codified as amended in 42 U.S.C. § 2000d (1994)), states in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

regulations,[8] the Department of Justice and the Department of Transportation issued regulations prohibiting recipients of federal assistance from adopting policies that have the effect of discriminating on the basis of race or national origin.[9] In other words, the regulations cover disparate impact discrimination.

The practice challenged in *Alexander v. Sandoval* was Alabama's decision to administer state driver's license examinations only in English.[10] Sandoval argued that this practice had the effect of subjecting non-English speaking individuals to discrimination based on their national origin.[11] In order to prevail on that claim, Sandoval did not have to prove intent to discriminate. Indeed, that is the importance of disparate impact theory; claims of disparate impact discrimination require a type of proof far easier to establish than intent to discriminate.[12]

In order to make out a prima facie claim based on disparate impact theory, the plaintiff need only show that the challenged practice or policy has an adverse and disproportionate impact on a protected category.[13] If plaintiff makes that showing, then, utilizing Title VI principles, the burden shifts to the defendant to show a substantial, legitimate justification,[14] at

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[8] 42 U.S.C. § 2000d-1 (1994) states in pertinent part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provision. . . ."

[9] *See, e.g.*, 28 CFR § 42.1004(b)(2) (1999). The Department of Justice regulation forbids funding recipients to: "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . . "

[10] *Alexander*, 532 U.S. at 279.

[11] *Id.*

[12] *See, e.g.*, Hazen v. Biggens, 507 U.S. 604, 609 (1993). In contrasting disparate treatment and disparate impact claims, the Court stated that in a disparate treatment claim, proof of a discriminatory motive is critical, but such a motive is not required under a disparate impact cause of action.

[13] *Id.*

[14] *Id.* The Court specifically stated that the practice that caused the discriminatory impact had to be justified by a business necessity.

which point the plaintiff has the opportunity to show that an alternative exists that lacks the discriminatory effect.[15]

As stated above, Sandoval's challenge of Alabama's English only rule was based on disparate impact theory, a theory encompassed by the agency regulations. Sandoval argued that the English only rule had an adverse and disproportionate impact on persons based on their national origin.[16] Both the district court[17] and the Eleventh Circuit Court of Appeals agreed.[18]

The Supreme Court did not address the question of whether the English only policy did in fact have the effect of discriminating on the basis of national origin.[19] Even more surprisingly, the Supreme Court did not reach the question of whether the disparate impact regulations of the Department of Justice and the Department of Transportation were authorized by the statute. Instead, the Court assumed for the purpose of deciding the case that the regulations were valid, but held that no private right of action exists to enforce them.[20]

This was an exceedingly surprising and notable decision given earlier Supreme Court decisions that had firmly established that private individuals may sue to enforce Title VI.[21] Further, the decision was surprising given the virtual unanimity among the circuit courts that a private right of action exists to enforce regulations issued pursuant to Title VI.[22] With Justice Scalia

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[15] *See* Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

[16] *Alexander*, 532 U.S. at 279.

[17] Sandoval v. Hagan, 7 F. Supp. 2d 1234 (Ala. 1998).

[18] Sandoval v. Hagan, 197 F.3d 484 (Cal. 1999).

[19] *Alexander*, 532 U.S. at 279.

[20] *Id.* at 281, 292.

[21] *See* Lau v. Nichols, 414 U.S. 563 (1974) (holding that the failure of the San Francisco school system to provide English language instruction to non-English speaking students violated § 601 of Title VI of the Civil Rights Act of 1964).

[22] *Alexander*, 532 U.S. at 295 n.1 (Stevens, J. dissenting). Justice Stevens specifically stated, "Just about every Court of Appeals has either explicitly or implicitly held that a private cause of action exists to enforce all of the regulations issued pursuant to Title VI, including disparate impact regulations."

writing for a five to four majority, the Court based its decision on its conclusions that Title VI does not itself prohibit disparate impact discrimination and that Congress did not intend to create a private right of action to enforce the disparate impact regulations, even assuming that those regulations were themselves valid under the statute.[23]

What makes the decision so peculiar is its unwillingness to directly address the question of the validity of the disparate impact regulations. Instead, as previously stated, the Court assumes, without deciding, that the regulations are valid. However, if the regulations are valid, that means Congress intended to allow the agencies to prohibit disparate impact discrimination. But, if Congress so intended, then presumably Congress intended a private right of action to enforce those regulations. It would be a strained statutory construction to conclude, in one breath, that Congress intended the agencies to determine the types of discrimination covered by Title VI and, in the very next breath, to conclude that Congress did not intend to permit private individuals, victims of that discrimination, to enforce those rights.

If, on the other hand, Congress did not authorize the agencies to prohibit disparate impact discrimination, if Congress clearly intended that Title VI only cover intentional discrimination, then the regulations are simply invalid and not enforceable by anyone. The decision would have been more straightforward and defensible had it decided the question of the validity of the regulations one way or the other.

The dissent, which was written by Justice Stevens and joined by the familiar grouping of Justices Souter, Ginsburg and Breyer, is explicit and rather blunt in its criticism.[24] It characterizes the majority decision as "unfounded in our precedent and hostile to decades of settled expectations."[25] The dissent reads the relevant precedents in a starkly different manner

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[23] *Id.* at 278, 292.

[24] *Id.* at 293-317 (Stevens, J., dissenting).

[25] *Id.* at 294.

than does the majority.[26] For example, while the majority reads *Cannon v. University of Chicago*[27] as establishing nothing beyond the fact that a private right of action exists under the statute, the dissent points out that *Cannon* was itself a disparate impact claim and thus stands in direct conflict with the holding reached by the majority.[28]

Further, the dissent reads the relevant portions of the statute, § 601[29] and 602,[30] not as advancing different and separate agendas, but rather as creating one integrated remedial scheme.[31] Section 601 prohibits discrimination in federally funded programs.[32] Section 602 authorizes the agencies to promulgate implementing regulations.[33] Under the dissent's view, the disparate impact regulations promulgated under § 602 do not create new rights, but rather serve the purpose of effectuating the anti-discrimination goals and mandate of § 601. [34] Indeed, the dissent points out that regulations prohibiting policies that have a disparate impact are not necessarily aimed only at non-intentional discrimination.[35] The dissent explains that many policies whose very intent is to discriminate are purposely expressed in race neutral terms, and proving intentional discrimination in those cases is virtually impossible.[36] An agency's adoption of disparate impact regulations may very well reflect a determination by that agency that there is widespread intentional discrimination practiced by an entity that the agency is charged with regulating, but that such discrimination is difficult to prove directly. [37] In order to get at that discrimination and implement the anti-discrimination mandate of the statute, it makes sense to look at

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[26] *Id.* at 294-301.
[27] 441 U.S. 677 (1979).
[28] *Alexander*, 532 U.S. at 298.
[29] 42 U.S.C. 2000d.
[30] 42 U.S.C. 2000d-1.
[31] *Alexander*, 532 U.S. at 304.
[32] 42 U.S.C. 2000d.
[33] 42 U.S.C. 2000d-1.
[34] *Alexander*, 532 U.S. at 304.
[35] *Id.* at 306-07.
[36] *Id.* at 307.
[37] *Id.*

what is typically the most probative evidence of intent.[38] What is most probative is objective evidence of what actually happened; the adverse, disproportionate impact on a protected category, rather than evidence describing the subjective state of mind of the actor.[39]

Under the dissent's view, the disparate impact regulations are not seen as creating new rights, but rather as part and parcel of a single, integrated, remedial scheme aimed at prohibiting discrimination in all programs and activities that receive federal money.[40]

Finally, the dissent argues that well-settled principles of administrative law, particularly the Chevron doctrine,[41] counsel in favor of deferring to agency interpretations of the statute's breadth.[42]

An interesting aspect of the divide between the majority and the dissent in this case, a theme that also emerges in *Circuit City v. Adams,*[43] has to do with each side of the five to four split accusing the other of ignoring the will of Congress in favor of its own policy preferences.[44] The justices have moved beyond mere criticism on the merits to what could be considered a more political critique, one that impugns the other side's motivations and challenges, as a matter of principle, the process of judicial decision making.[45]

Thus, Justice Stevens characterizes the majority opinion in *Alexander* as "the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to

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[38] *Id.*

[39] *Id.*

[40] *Alexander*, 532 U.S. at 543 n.20.

[41] *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 843-45 (1984) (noting that when agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, that interpretation of the statute's breadth is controlling unless it presents an unreasonable construction of the statute).

[42] *Alexander,* 532 U.S. at 309.

[43] 530 U.S. 105 (2001).

[44] *Alexander,* 532 U.S. at 316-17.

[45] This theme is clearly part of the *Bush v. Gore* debate, 531 U.S. 98 (2000).

discern the intent of the Congress that enacted Title VI."[46] He accuses the majority of adopting a methodology that "blinds itself to important evidence of congressional intent" in order to "impose its own preferences as to the availability of judicial remedies."[47] On the other side, Justice Scalia accuses the dissenting judges of trying for "one last drink," by finding an implied right of action which constitutes "an act of judicial self-indulgence."[48] The bitterness between the majority and the dissent was reflected by the fact that Justice Stevens chose to read portions of his dissent from the bench, expressing not only criticism of the decision on the merits but criticism of the Court's reaching out to decide an issue in the absence of any conflict in the lower federal courts.

Why did I begin by saying that *Alexander v. Sandoval* was the most important of the civil rights decisions of the term? There are two reasons. First and most obviously, by limiting Title VI to only intentional acts of discrimination, the Court has eliminated private rights of action to challenge the ways in which discrimination typically manifests itself. It is the very rare occasion where a federal policy is capable of being challenged on the ground of overt, facial racial discrimination. Far more typically, discrimination is more subtle and expressed in terms of adverse and disproportionate impact on a protected category. By limiting Title VI to programs that are overtly discriminatory, the Court has dramatically limited its usefulness as a tool to address discrimination in federally financed programs.

While theoretically a federal agency could attempt to enforce its own regulations and could even attempt to cut off federal funds, that is not a sufficient remedy, in part due to the lack of resources that have historically been devoted for that purpose. In fact, the brief submitted by the Government in support of the plaintiffs acknowledged that "private enforcement provides a necessary supplement to government enforcement."[49]

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[46] *Alexander*, 532 U.S. at 317.
[47] *Id.* at 313.
[48] *Id.* at 311.
[49] *Id.* at 291.

Second, there is reason to be concerned that the decision will be extended to other civil rights statutes, most likely Title IX,[50] Title VI's "gender-based twin."[51] That means that private plaintiffs alleging gender discrimination would have to prove intentional discrimination on the basis of gender. Claims of disproportionate impact would not be actionable.

One significant unanswered question raised by the decision is, if the disparate impact regulations are valid, which the Court assumed for purposes of the decision, can they be enforced under § 1983?[52] In the first decision to address that question post-*Alexander*, a New Jersey district court held the disparate impact regulations *could* be enforced pursuant to § 1983, however that ruling was reversed on appeal.[53] That case is *South Camden Citizens in Action v. The New Jersey Department of Environmental Protection*,[54] involving a claim that the opening of a sixty million-dollar cement plant would have an adverse, disparate impact on the health of African Americans and Hispanics.[55] Whether or not § 1983 offers a vehicle to enforce the disparate impact regulations, assuming the validity of those regulations, remains an open and obviously very significant question.

Circuit City v. Adams

The second case of significant import to discrimination claimants is *Circuit City v. Adams*,[56] where the same five to four

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[50] Title IX of the Education Amendments of 1972, 86 Stat. 373 (codified as amended, 20 U.S.C. § 1681 *et. seq.* (1994)).

[51] 42 U.S.C. § 2000d et. seq.

[52] 42 U.S.C. § 1983 (1994) provides in pertinent part: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable."

[53] S. Camden Citizens in Action v. N. J. Dep't of Envtl. Prot., 274 F. 3d 771 (3d Cir. 2001).

[54] 274 F.3d 771.

[55] *Id.*

[56] 532 U.S. 105 (2001).

majority held that the FAA, the *Federal Arbitration Act*,[57] exempts only employment contracts of transportation workers.[58] What does this mean? It means that claimants like Saint Clair Adams, who signed employment contracts containing arbitration clauses, may not seek judicial review of their state or federal employment discrimination claims, but are bound by the arbitration clause.[59]

Justice Kennedy wrote for the majority and styled his decision in seemingly innocuous, non-controversial statutory construction terms. The precise issue in the case was one of statutory construction.[60] The FAA exempts "contracts of employment for seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[61] The question in the case was how to interpret the phrase "any other class of workers."[62] Does the exemption apply to all workers engaged in commerce or to a more limited category of workers?

The Court applied the maxim *ejusdem generic* to answer that question, which means that general words following specific words should be construed to embrace only objects similar to the specifically enumerated objects.[63] Since the general words "other class of workers engaged in . . . commerce" follows the specific categories of seamen and railroad employees, the Court construed the term to mean transportation workers as opposed to all other workers in interstate commerce.[64] Thus, the FAA exempts only

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[57] 9 U.S.C. § 1 *et seq.* (year).

[58] *Circuit City*, 532 U.S. at 105.

[59] *Id.* at 109-10. When Saint Clair Adams applied for a job at Circuit City she signed an application form which included the following provision: "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of . . . my application, employment and/or cessation of employment. . . exclusively by final and binding arbitration . . ."

[60] *Id.* at 110 (reasoning that if there was an exception in relation to arbitration agreements in employment contracts it had to be premised on the language of the statute itself).

[61] 9 U.S.C. § 1 *et seq.*

[62] *Circuit City*, 532 U.S. at 114.

[63] *Id.* at 114-15.

[64] *Id.* at 115.

contracts of employment of transportation workers, meaning that all other employment contracts are subject to the FAA.[65]

One interesting aspect of the decision involves the court's chameleon-like commerce clause jurisprudence. The question was whether the Court should interpret the phrase "engaged in . . . commerce" in light of the Court's commerce clause jurisprudence of 1925, when the statute was enacted.[66] The Court refused, saying "(i)t would be unwieldy . . . to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment."[67] Given how dramatically the Court's commerce clause decisions have changed over the years,[68] that would be quite a challenge.

Another interesting aspect of the decision is the extent to which the majority opinion produces an anomalous federalism result. Keep in mind that the five justices forming the majority are the five who have recently revolutionized the Court's federalism jurisprudence. Yet, the majority rejected the argument advanced by twenty-two states[69] that applying the FAA to employment contracts in effect preempts state employment laws which limit the ability of employers and employees to enter into arbitration agreements.[70] The states argued that such a holding infringes upon the states' traditional role in regulating employment relationships, including prohibiting employees from contracting away their right to pursue state law discrimination claims in court.[71] The Supreme Court's response was, "don't blame us," as prior decisions of the Court had already established that Congress intended the FAA to apply in state courts and to

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[65] *Id.* at 119.

[66] *Id.* at 116.

[67] *Id.* at 118.

[68] *Circuit City*, 532 U.S. at 116. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

[69] The attorney generals of each of 22 states in disagreement filed Amicus Briefs with the Court.

[70] *Circuit City*, 532 U.S. at 120-22.

[71] *Id.*

preempt state anti-discrimination laws to the contrary.[72] Further, the Court pointed to the benefits of arbitration over litigation, particularly the benefit of avoiding the high costs of litigation.[73]

As in *Alexander v. Sandoval*, the dissent is harshly critical of the majority for using a "method of statutory interpretation that is deliberately uninformed and hence unconstrained."[74] Again, the dissent accuses the majority of deliberately ignoring statutory meaning in order to substitute its own preference, in this case for binding arbitration of employment discrimination disputes.[75] "Such an approach produces a result consistent with the Court's own views of how things should be, but defeats the very purpose for which the provision was enacted."[76] According to the dissent, the FAA was intended to cover commercial contracts and not employment contracts.[77] In fact, organized labor's opposition to the Act was based on the disparity in bargaining power between employers and employees, which is why the exemption for employment contracts was included.[78]

According to the dissent, the majority "simply ignores the interest of the unrepresented employee . . . and skews its interpretation to its own policy preferences."[79] The dissent quotes Justice Barak of the Supreme Court of Israel in criticizing the so-called "'minimalist' judge 'who holds that the purpose of the statute may be learned only from its language,'" but who in fact exercises more "discretion than the judge 'who will seek guidance from every reliable source.'"[80]

Among the issues left unresolved by the decision is how to define transportation workers. Does the category include truck

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[72] *Id.* The Court specifically cited its decision in Southland Corp. v. Keating, 465 U.S. 1 (1984), for ruling that Congress intended the FAA to pre-empt state anti-arbitration laws.

[73] *Circuit City*, 532 U.S. at 123.

[74] *Id.* at 133 (Stevens, J., dissenting).

[75] *Id.* at 132-33.

[76] *Id.*

[77] *Id.* at 124.

[78] *Id.* at 132-33.

[79] *Circuit City*, 532 U.S. at 132-33.

[80] *Id.* at 133 (quoting from Judicial Discretion 62 (Y. Kaufmann transl. 1989)).

drivers? Does the category include ticket agents for airlines? Does it include travel agents? Other issues left unresolved include whether the substantive rights and remedies provided by anti-discrimination statutes can be lost, rights such as punitive damages and attorneys' fees. Most lower courts have agreed that employees do not lose the remedies available under federal law by signing binding arbitration agreements.

Perhaps the most important issue left unresolved by *Circuit City* is what is the scope of the EEOC's power to pursue claims on behalf of discrimination claimants who are themselves precluded from seeking judicial relief by virtue of binding arbitration agreements? That issue is likely to be resolved this term in a case entitled *EEOC v. Waffle House, Inc.*[81] The EEOC argued that even where the individual claimant is precluded from bringing suit, the agency has the authority to sue employers for back pay, reinstatement and damages on behalf of those discrimination claimants.[82] The Fourth Circuit ruled that the agency could seek injunctions to stop illegal workplace practices, but could not seek back pay or damages.[83] The same result has been reached in the Second Circuit in *EEOC v. Kidder Peabody*.[84] However, the Sixth Circuit in *EEOC v. Frank's Nursery and Crafts*[85] concluded that the EEOC was not precluded from pursuing claims for monetary relief.[86] The Court is likely to resolve this question and this split in *Waffle House*.[87]

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[81] 534 U.S. 279, 122 S. Ct. 754, 766 (2002) Subsequent to the symposium, the Supreme Court decided *Waffle House* and held that an agreement between an employer and their employee to arbitrate employment related disputes does not bar the EEOC from pursuing victim-specific judicial relief.

[82] *Id.*

[83] EEOC v. Waffle House, 193 F.3d 805 (4th Cir. 2000).

[84] 156 F.3d 298 (2d Cir. 1998).

[85] 177 F.3d 448 (6th Cir. 1999).

[86] *Id.*

[87] 122 S. Ct at 766 (January 19, 2002). Subsequent to the symposium the Supreme Court resolved the split in the Circuits and agreed with the Sixth Circuit's holding that the EEOC was not precluded from pursuing claims for monetary relief where the employer and employee had previously settled.

PGA Tour v. Martin

The case on last term's docket of most interest to golfers was *PGA Tour v. Martin*,[88] raising ADA issues within the context of tournament golf. Specifically, the issue was whether Title III of the Americans with Disabilities Act[89] required the PGA tour to allow Casey Martin to use a golf cart during those stages of a PGA tournament where the PGA rules require participants to walk the course.[90]

That issue required the Court to decide whether the ADA protects access to professional golf tournaments by a qualified entrant with a disability and whether a disabled contestant may be "denied the use of a golf cart because it would 'fundamentally alter the nature' of the tournaments to allow him to ride when all other contestants must walk."[91] In a seven to two decision, with the Court's avid golfer Justice Stevens writing for the majority, the Court held that PGA golf tours are within the coverage of the ADA and permitting Casey Martin to use a golf cart would not fundamentally alter the nature of the event.[92]

Casey Martin suffers from Klippel-Trenauney-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart.[93] Walking causes him pain, fatigue, and anxiety, and creates a significant risk of hemorrhaging, developing blood clots and fracturing his tibia in a way that might require amputation.[94] Based on this disorder, Casey Martin is indisputably a disabled person within the meaning of the ADA.[95] The Act defines disabled person as an individual with "a physical or a mental impairment that

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[88] 532 U.S. 661 (2001).
[89] 42 U.S.C. § 12101 *et seq.* (1990).
[90] *P.G.A. Tour*, 532 U.S. at 664.
[91] *Id.* at 695-96.
[92] *Id.* at 666.
[93] *Id.* at 668.
[94] *Id.*
[95] 42 U.S.C. § 12102(2)(A)(2001).

substantially limits one or more of the major life activities of such an individual."[96]

The ADA prohibits discrimination against disabled individuals in employment (Title I),[97] in public services (Title II),[98] and by public accommodations (Title III).[99] Title III, which is the section of the Act relevant to this case, provides that:

> [N]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.[100]

The statutory definition of "public accommodation" explicitly includes golf courses.[101] The PGA argued in the district court that it is "a private club exempt from Title III,"[102] an argument not advanced in the Supreme Court.[103] Nor did the PGA advance an argument it had made in the circuit court that the competitors' area behind the ropes was not a public accommodation.[104] Rather, the PGA's argument on the coverage issue in the Supreme Court was that "competing golfers are not members of the class of persons protected by Title III."[105] The PGA's argument was that Title III protects clients and customers, not people like Casey Martin who is functioning as a provider of entertainment like an actor in a theatre production.[106] Casey

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[96] *Id.*
[97] 42 U.S.C. § 12112 (2001).
[98] 42 U.S.C. § 2000a (2001).
[99] 42 U.S.C § 12182 (2001).
[100] 42 U.S.C. § 12182 (a) (2001).
[101] 42 U.S.C. §12181(7) (L) (2001).
[102] Martin v. PGA Tour, 994 F. Supp. 1242, 1244 (D. Or. 1998), *aff'd,* 204 F.3d 994 (9th Cir. 2000), *aff'd*, 532 U.S. 661, 121 S. Ct. 1879 (2001).
[103] *P.G.A. Tour*, 532 U.S. at 661.
[104] *P.G.A. Tour*, 204 F.3d at 994.
[105] *P.G.A. Tour*, 532 U.S. at 678.
[106] *Id.*

Martin's claim, according to the PGA, "is nothing more than a straightforward discrimination-in-the-workplace complaint" which is not covered by Title III but would come within Title I, which covers employment, if Casey Martin were an employee and not an independent contractor.[107]

The Court rejected this argument, finding that even if Title III is limited to clients and customers, Martin qualifies as someone who paid the PGA several thousand dollars for the chance to compete.[108] Thus, the Court concludes that "as a public accommodation during its tours and qualifying rounds, [the PGA] may not discriminate against either spectators or competitors on the basis of disability."[109]

Having decided the coverage issue, the question becomes whether denying Martin the use of a golf cart constitutes discrimination within the meaning of the Act.[110] It seems that it is the part of the decision that has caused the stir, at least within the golfing world. Title III defines discrimination as:

> [A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.[111]

There was no dispute that allowing Martin to use a cart constitutes a "reasonable modification" and one that is necessary if he is to compete.[112] The dispute was whether allowing him to

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[107] *Id.*
[108] *Id.* at 680.
[109] *Id.* at 681.
[110] *Id.* at 681-82.
[111] 42 U.S.C. § 12182 (b)(2)(A)(ii) (2001).
[112] *PGA Tour*, 532 U.S. at 683-84.

use the cart would "fundamentally alter the nature of the event."[113]

Here is where the case loses its significance beyond the narrow, albeit passionate, world of athletes in general and more particularly golfers. On one side of the debate you have Arnold Palmer, Jack Nicklaus and Ken Venturi who testified that fatigue can be a critical factor in a tournament, and that permitting one golfer to use a cart would give him a competitive advantage over the other players who must walk the course.[114] For example, Arnold Palmer testified that fatigue can cost you one stroke or more and that many a tournament has been lost by one stroke.[115] Jack Nicklaus testified that golfers are required to walk the course because physical fitness and fatigue are part of the game.[116] Ken Venturi opined that the use of golf carts would fundamentally alter the nature of the competition because it would remove the fatigue factor.[117]

The Supreme Court was thus faced with the monumental task of deciding what in fact is fundamental to the game of golf. The Court decided that a fundamental alteration could be affected in either of two ways: by changing an essential aspect of the game for everyone, as by changing the diameter of the hole from 3 to 6 inches; or by giving a disabled person an advantage over others and thus fundamentally altering the character of the competition because the ADA requires equal access to the event, not an equal chance to win.[118] Seven Justices of the Court decided that permitting a disabled golfer to use a golf cart would neither alter such an essential aspect of the game of golf as to be unacceptable nor give Casey Martin an advantage over the other golfers so as to alter the nature of the competition.[119]

The Court justifies its decision on its review of the history of golf, which supports the conclusion that shot-making is the

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[113] *Id.*
[114] *Id.* at 670-71.
[115] *Id.* at 671 n.13.
[116] *Id.* at 671 n.14.
[117] *Id.* at 671 n.15.
[118] *P.G.A. Tour*, 532 U.S. at 670-71.
[119] *Id.* at 690-91.

truly essential aspect of the game and that walking the course is far from universally required and thus not essential to the game.[120] The Court relied on the "Rules of Golf," on the fact that golf carts are permitted in the open qualifying events for PGA tournaments and in senior events,[121] on the fact that conditions can never be truly equalized for all players given changing weather conditions and given luck,[122] on the fact that the majority of tournament golfers prefer to walk the course to relieve stress or for other strategic reasons,[123] and finally on the fact that, at least according to one professor of physiology, the calories expended in walking a golf course is approximately 500 calories, "nutritionally...less than a Big Mac," [124] meaning that the fatigue factor cannot be deemed significant.

One aspect of the Court's decision that merits attention is the Court's insistence that the ADA requires an individualized inquiry.[125] Thus, deciding whether Casey Martin was entitled to the modification he sought required an inquiry as to whether allowing *him* to use a cart would fundamentally alter the nature of the PGA tournament.[126] The Court determined that the answer to that question was no because if the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments, that purpose is not undermined by permitting Martin to use a cart since he "endures greater fatigue even with a cart than his able-bodied competitors do by walking."[127] What the modification does is "allow Martin the chance to qualify for and compete in the athletic events [that the PGA] offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires."[128]

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[120] *Id.* at 683-84.
[121] *Id.* at 687.
[122] *Id.*
[123] *Id.*
[124] *Martin*, 994 F. Supp. at 1250.
[125] *P.G.A. Tour*, 532 U.S. at 690.
[126] *Id.*
[127] *Id.* at 690 (quoting *Martin*, 594 F. Supp. at 1252).
[128] *Id.*

The most entertaining part of the case is, of course, Justice Scalia's dissent (joined by Justice Thomas), a dissent that the majority characterizes as a "post-modern view of What is Sport."[129] Justice Scalia argues that Title III covers only clients and customers and that Casey Martin is neither.[130] For example, Title III would cover spectators at a zoo but not the "animal handler . . . bringing in the latest panda;" it would cover spectators at a theater, but not the theatre performers.[131] Justice Scalia equates competing for entry into the PGA tour to competing in an open audition for the Sopranos.[132] Individuals trying out for those events are not, in Justice Scalia's view, converted into customers merely because they perform in places of public accommodation.[133]

Justice Scalia's distinctive sarcasm emerges when he argues that even if Casey Martin is a consumer of the "privilege" of the PGA tour competition, the ADA does not authorize the Court to alter the rules of the PGA competition.[134] Deciding whether walking the course is a fundamental aspect of golf is to Justice Scalia an incredibly difficult and incredibly silly question. Let me give you a flavor of his dissent:

> It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power 'to regulate Commerce with foreign Nations, and among the several States' to decide What is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once

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[129] *Id.*
[130] *Id.* at 689 (Scalia, J., dissenting).
[131] *P.G.A. Tour*, 532 U.S. at 693.
[132] *Id.* at 696-97.
[133] *Id.* at 697.
[134] *Id.* at 699.

> again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a 'fundamental' aspect of golf.[135]

Justice Scalia ends his dissent by predicting that the Court's emphasis on the need for individualized determinations will spawn a generation of litigation as parents of a Little League player with attention deficit disorder tries to convince a judge that their son's disability makes it at least twenty-five percent more difficult for him to hit a pitched ball, thereby entitling him to four strikes, which would then require the court to decide whether in baseball three strikes are metaphysically necessary.[136] Justice Scalia concludes with a reference to *Animal Farm* and a quote by Kurt Vonnegut, "The year was 2001 and everybody was finally equal."[137]

The ADA case on the docket this term is likely to have more long-lasting significance than *PGA v. Martin*. The case, *Toyota Motor Manufacturing v. Williams*,[138] raises an important definition issue. Is an individual disabled within the meaning of the Act when the individual's impairment prevents her from performing her existing job but not other jobs? The impairment issue in *Toyota Motor Manufacturing* is carpal tunnel syndrome that prevents the plaintiff from working on the Toyota assembly line.[139]

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[135] *Id.* at 699-700 (citations omitted).

[136] *P.G.A. Tour*, 532 U.S. at 702-03.

[137] KURT VONNEGUT, ANIMAL FARM.

[138] 224 F.3d 840 (6th Cir. 2000), *cert. granted,* 532 U.S. 970 (U.S. Apr. 16, 2001) (No. 00-1089).

[139] *Id.* at 843. Subsequent to the symposium, the Court held that carpal tunnel syndrome is not a disability within the meaning of the Act because it did not prevent the plaintiff from performing tasks that are of central importance to

Pollard v. E.I. DuPont

The Court decided two Title VII cases last term. The first is *Pollard v. E.I. duPont*,[140] which represents an important win for discrimination plaintiffs. In this case, the Court unanimously held that a front pay award is not a form of compensatory damages and is therefore not subject to the statutory caps contained in the Civil Rights Act of 1991.[141]

Sharon Pollard brought a Title VII action based on sexual harassment.[142] Both the District and the Circuit Court of Appeals found that she was subjected to blatant sexual harassment by co-workers and that although her supervisors were aware of the harassment, they failed to take appropriate steps to stop the offending behavior or discipline the responsible parties.[143] Plaintiff worked in a DuPont plant in Memphis, Tennessee, in a section that made hydrogen peroxide.[144] Plaintiff's co-workers made it clear that they did not want a woman working in their section.[145] They protested her leadership of DuPont's program of encouraging workers to participate in Take Your Daughter to Work Day; they disrupted the machinery that Ms. Pollard was responsible for operating; they created false fire alarms so that she had to deal with nonexistent problems; they cut the tires on her bicycle, they ran her car off the road, they called her names; and they left a biblical verse in her locker about the need for women to remain quiet.[146]

The harassment caused Mrs. Pollard to take a medical leave of absence so that she could seek psychological assistance,

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most people's daily lives, a necessary element of proving a substantial limitation in the major life activity of performing manual tasks. Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002)

[140] 532 U.S. 843 (2001).

[141] *Id.* at 853.

[142] *Id.* at 845.

[143] Pollard v. Dupont, 16 F. Supp. 2d 913, (W.D. Tenn. 1998), *aff'd* 213 F.3d 933 (6th Cir. 2000).

[144] *Pollard*, 532 U.S. at 845.

[145] *Pollard*, 213 F.3d at 933, *rev'd*, 121 S. Ct. 1946 (2001).

[146] *Id.* at 938-39.

prompting her coworkers to hold a party to celebrate her absence.[147] DuPont managers asked her to return from her medical leave, despite her doctors' advice, although management would not change either her shift or her work area.[148] When she refused to return to work under those circumstances, Ms. Pollard was dismissed.[149] Ms. Pollard sued under Title VII, and was awarded $107,364.00 in back pay and benefits, over $252,997.00 in attorney's fees, and $300,000.00 for compensatory damages,[150] which under the Civil Rights Act of 1991, is the maximum amount permitted in compensatory damages.[151]

The Civil Rights Act of 1991 was enacted to expand the remedies available to victims of employment discrimination.[152] Prior to 1991, Title VII authorized only injunctions, reinstatement, back pay, benefits, and attorney's fees.[153] The 1991 amendment expanded those remedies to include the right to a jury trial and the right to compensatory damages and punitive damages subject to statutory caps.[154] The number of employees determines the statutory cap.[155] Based on the fact that DuPont employed more than 500 employees, the statutory cap that applied to compensatory damages in this case was $300,000.00.[156] The question presented by the case is whether front pay constitutes compensatory damages, which would make such an award subject to the statutory cap of $300,000.00.[157]

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[147] *Id* at 941.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 945.

[151] 42 U.S.C. 1981a(b)(3) (2001).

[152] 42 U.S.C. § 1981a(a)(1) (2001) provides in pertinent part that: "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964."

[153] Civil Rights Act of 1964 §706, 78 Stat. 253 (1964) (codified as amended in 42 U.S.C. 2000e 5(g)(1)).

[154] Civil Rights Act of 1991, Pub.L. 102-166, Title I, § 102, 105 Stat. 1072 (1991) (codified as amended in 42 U.S.C. § 1981a (2001)).

[155] 42 U.S.C.§ 1981a(b)(3)(D) (2001).

[156] *Id.*

[157] *Pollard,* 532 U.S. at 845.

With Justice Thomas writing for a unanimous Court, front pay was determined not to be an element of compensatory damages and therefore not subject to the statutory cap.[158] Front pay, we are told, is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.[159] Since restatement is not always a viable option, as where the position no longer exists, or where continued hostility between the parties makes it inappropriate, front pay can substitute for reinstatement.[160] The Court's reasoning was straightforward: since front pay was virtually universally recognized as a remedy authorized by Title VII,[161] and since the Civil Rights Act of 1991 was indisputably intended to *expand* the remedies available in cases of intentional employment discrimination, to create *additional* remedies, it would make no sense to subject awards of front pay to the caps applicable to awards of compensatory damages.[162] The Act explicitly states that compensatory damage does not include any type of relief authorized under pre-existing Title VII law,[163] and since front pay was a type of relief authorized, it is excluded from the meaning of compensatory damages and thus not subject to the statutory cap.[164]

Justice Thomas justifies treating front pay awards in lieu of restatement the same as front pay awards from the date of judgment to the date of reinstatement.[165] He points out that treating them differently would produce the "strange result that employees could receive front pay" only when reinstatement is actually available, but not when reinstatement is not an option, "whether because of continuing hostility between the parties; or because of psychological injuries that the discrimination has caused the plaintiff. Thus, the most egregious offenders could be

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[158] *Id.* at 847.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 848.
[162] *Id.* at 853.
[163] 42 U.S.C. § 1981 (b)(2) (2001).
[164] *Pollard*, 532 U.S. at 853.
[165] *Id.*

subject to the least sanctions."[166] That, in the Court's view, would be a nonsensical result.

While the unanimous decision is a rather straightforward application of the statutory scheme, it is nevertheless an important win for victims of sex discrimination, particularly as it relates to awards of front pay in lieu of reinstatement. How to measure those damages is a tricky question and one that produces a good deal of uncertainty. When reinstatement is not an option, what period of time does the front pay award cover? Can front pay cover the employee's entire future work expectancy, subject to a duty to mitigate? Does the collateral source rule apply? These issues are significant because according to employment litigators, reinstatement has become increasingly less practical as a remedy, particularly in sexual harassment hostile work environment situations. Where reinstatement is not an option, front pay is an exceedingly important remedy, as evidenced by the fact that Ms. Pollard will now be seeking an additional award of approximately $800,000.[167]

Clark County v. Breedon

Another seemingly straightforward Title VII case, this one dealing with retaliation, was *Clark County v. Breedon*.[168] Notwithstanding the fact that the case was decided in a brief per curiam decision, suggesting that it presented an easy question not worthy of full briefing or oral arguments, it does raise some interesting questions.

Title VII prohibits an employer from retaliating against an employee who has brought a Title VII complaint or has otherwise complained or opposed a practice made unlawful by Title VII.[169] What happens when an employee is retaliated against for

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[166] *Id.*

[167] *Pollard*, 532 U.S. at 847. The District Court observed, and the Court of Appeals agreed, "the $300,000.00 award is, in fact, insufficient to compensate plaintiff."

[168] 532 U.S. 268.

[169] Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended in 42 U.S.C. 2000e 5(g)(1)).

complaining about conduct that does not in fact violate Title VII? Is that retaliation prohibited by Title VII? Does the answer to that question turn on whether the employee had a good faith, albeit mistaken, belief that the practice was unlawful?

Here's a description of the conduct that Shirley Breedon maintained violated Title VII. Ms. Breedon, her supervisor and another employee, both males, met to review the psychological evaluation reports of four job applicants.[170] One of the reports contained a notation that the applicant had once commented to a coworker, "I hear making love to you is like making love to the Grand Canyon."[171] Ms. Breedon's supervisor read the notation aloud, looked at her and said, "I don't know what that means,"[172] and the other employee said, "Well, I'll tell you later," at which point both men chuckled.[173] Ms. Breedon complained to several supervisors about this incident, which she considered to be sexual harassment, and eventually filed a charge with the Nevada Equal Rights Commission and the EEOC.[174] Her claim of retaliation in federal court was that she was transferred in retaliation for her complaints.[175]

The district court rejected Ms. Breedon's claim of retaliation,[176] but the Ninth Circuit reversed, applying its rule that unlawful retaliation occurs when an employer acts against an employee who has a reasonable good faith belief that her rights have been violated, even if she is wrong.[177] Without ruling on the correctness of this rule, the Supreme Court reversed the Ninth

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[170] *Clark County*, 532 U.S. at 269.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] Breedon v. Clark County, 232 F.3d 893 (9th Cir. 2000).

[176] Breeden v. Clark County Sch. Dist., 1999 U.S. Dist. LEXIS 22975 (D. Nev. 1999) (holding that Breeden "had not shown that any causal connection exists between her protected activities and the adverse employment decision.")

[177] *Breeden*, 232 F.3d at 894. The Ninth Circuit held that Breeden was shielded from retaliation only if she had an "objectively reasonable, good faith belief" that the remarks made by her co-worker and supervisor constituted unlawful sexual harassment.

Circuit, finding that no one could reasonably believe that the incident of which Ms. Breedon complained violated Title VII.[178]

In so doing, the Court reaffirmed its definition of sexual harassment, which, to be actionable, must be so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.[179] Quoting its recent decisions in *Faragher v. Boca Raton*[180] and *Harris v. Forklift Systems*,[181] the Court reiterated that workplace conduct must be measured in context, by "looking at all the circumstances including the 'frequency of the discriminatory conduct,' its severity; whether it is physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance'."[182] Thus, "simple teasing, offhand comments, and isolated incidents (unless extremely serious)," will not amount to sexual harassment.[183]

Using that standard, the Court concluded that no reasonable person could have believed that the single incident Ms. Breedon complained of violated Title VII.[184] Ms. Breedon's job required her to screen job applicants, which required her to review the statement contained in the report.[185] The fact that her supervisor said that he did not know what the comment meant, that her co-worker said he would explain it later, and that the two of them chuckled, can hardly be considered an extremely serious isolated incident constituting prohibited sexual harassment.[186]

A second reason for rejecting Ms. Breedon's claim of retaliation was her inability to prove causation between her purportedly protected activities and the adverse action taken

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[178] *Clark County*, 532 U.S. at 269.
[179] *Id.* at 271.
[180] 524 U.S. 775 (1998).
[181] 510 U.S. 17 (1993).
[182] *Clark County*, 532 U.S. at 271 (citing *Faragher*, 524 U.S. at 787-88 (quoting *Harris*, 510 U.S. at 23)).
[183] *Clark County*, 532 U.S. at 271.
[184] *Id.*
[185] *Id.*
[186] *Id.*

against her.[187] The evidence established that Ms. Breedon's supervisors had been contemplating transferring her before they knew of the federal suit.[188] The Court held that "employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is not evidence of causality.[189] As for the fact that the employer knew two years before the transfer that plaintiff had filed an EEOC complaint, the Court stated that while there are cases finding causality based on the temporal proximity between an employer's knowledge of protected activity and an adverse employment action, the temporal proximity must be very close.[190] "Action taken [as here] twenty months later suggests, by itself, no causality at all."[191]

The Supreme Court does not directly pass on the Ninth Circuit rule which extends the protection of Title VII to retaliation against an employee for activity that the employee wrongly, but in good faith believes is protected under Title VII.[192] Does the viability of anti-discrimination statutes require the protection of all those who are colorably aggrieved? The answer seems to be yes. Thus, the Second Circuit has held that "To establish that an activity is protected, a plaintiff need only prove that she was acting under a good faith belief that the activity was of the kind covered by the statute."[193] That is also the rule that the New York courts have applied in interpreting the New York Human Rights Law.[194] It remains to be seen whether the Supreme Court will ultimately interpret Title VII that way.

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[187] *Id.* at 273.
[188] *Id.*
[189] *Clark County*, 532 U.S. at 274.
[190] *Id.* at 273.
[191] *Id.* at 274.
[192] *Id.*
[193] Cosgrove v. Sears Roebuck, 9 F.3d 1033, 1039 (2d Cir. 1993).
[194] Dodd v. Middletown Lodge, 264 A.D.2d 706, 695 N.Y.S.2d 115 (2d Dep't. 1999).

Conclusion

Of the five civil rights cases that have been presented, a scorecard would indicate a good year for discrimination claimants, who won three out of five. But, that would be accurate merely from a quantitative viewpoint. A qualitative perspective would probably conclude that subjecting all employment contracts to the Federal Arbitration Act and refusing to permit private causes of action to remedy disparate impact discrimination in federally funded programs and activities made for a good year for discrimination defendants.

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