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OTHER CIVIL RIGHTS DECISIONS IN THE OCTOBER 2005 TERM: TITLE VII, IDEA, AND SECTION 1981

*Eileen Kaufman**

The Supreme Court decided six discrimination and civil rights cases last Term—three arising under Title VII,¹ one under § 1981,² and two under the Individuals with Disabilities Education Act (“IDEA”).³ In terms of the scorecard, the Title VII decisions were all

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¹ Title VII, 42 U.S.C. § 2000e-3(a) (2000) states:

It shall be unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

See Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006) (holding that the anti-retaliation provision of Title VII is not limited to the discriminatory actions that affect the terms and conditions of employment); *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 (2006) (holding that the numerosity requirement in Title VII, which requires an employer to have fifteen or more employees, is not jurisdictional); *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (discussing the standard for determining whether an employer’s alleged non-discriminatory action against an employee is pretextual).

² 42 U.S.C. § 1981(a) (2000) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

See Domino’s Pizza, Inc. v. McDonald, 126 S. Ct. 1246, 1252 (2006) (holding that a plaintiff cannot sustain a claim under § 1981 unless he has existing rights on the contract sought to be enforced).

³ 20 U.S.C. §§ 1400 et seq. (2000). *See Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005) (holding that at an “impartial due process hearing” the burden of persuasion lies with the

plaintiff-friendly and unanimous, whereas the § 1981 case and the IDEA cases were defendant victories.⁴ The cases are important not just because they resolve important open issues of discrimination law, but because, as we will see, they provide interesting insights into the judicial philosophy of the newest member of the Court—Justice Alito.

I. TITLE VII DECISIONS

A. **Burlington Northern & Santa Fe Railway Co. v. White**

The most important employment discrimination case of last Term undoubtedly was *Burlington Northern & Santa Fe Railway Co. v. White*,⁵ a case that significantly helps to define the type of retaliation prohibited under Title VII. Retaliation complaints are the fastest growing type of discrimination case—with more than a

party seeking relief); *Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455, 2461 (2006) (holding that the provision awarding fees to the prevailing party in an IDEA case does not include any recovery of the costs of expert fees).

⁴ For plaintiffs' victories in all Title VII cases see *Burlington Northern*, 126 S. Ct. at 2416 (affirming the plaintiff's Title VII claim because there was "sufficient evidentiary basis to support the jury's verdict [for her] retaliation claim"); *Arbaugh*, 126 S. Ct. at 1245 (holding that plaintiff's claim was not jurisdictionally barred because of the numerosity requirement provision under Title VII); and *Ash*, 126 S. Ct. at 1197 (holding that plaintiff's claims of discrimination under Title VII were cognizable even if the disparity of the qualifications did not "virtually jump off the page and slap you in the face" as the standard the Eleventh Circuit required).

For defendants' victories in the two IDEA cases and the § 1981 case see *Arlington*, 126 S. Ct. at 2461 (holding that prevailing parents may not recover expert witness fees from defendants under IDEA claims); *Schaffer*, 126 S. Ct. at 537 (holding that defendant school in an IDEA case does not bear the burden of persuasion at hearings and that the burden should be placed on the party asserting the claim); and *Domino's Pizza*, 126 S. Ct. at 1252 (finding for the defendant because the plaintiff could not state a claim under § 1981 because he had no existing rights under the contract to enforce).

⁵ *Burlington Northern*, 126 S. Ct. 2405.

quarter of all complaints filed with the Equal Employment Opportunity Commission (“EEOC”) alleging retaliation. Until this decision, there had been tremendous uncertainty about the definition of retaliation and about how serious the retaliatory conduct had to be in order to be actionable.

Title VII not only prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, it also prohibits employers from retaliating against employees who complain about discrimination. The question in this case was whether the anti-retaliation provision only covers conduct that affects the actual terms and conditions of employment or is it broader—does it also prohibit retaliatory conduct occurring away from the workplace? And, how harmful must the retaliation be to be actionable? Does the retaliation have to be an outright firing or a reduction in pay, or does other conduct, such as excluding the employee from training lunches, reassigning responsibilities to the employee, or giving the employee the cold shoulder qualify?

Sheila White was hired by Burlington Northern & Santa Fe Railway Corporation as a track laborer and she was assigned to the Maintenance of Way Department, where she was the only woman. The job required her to remove and replace track components, transport track material, cut brush, clear litter and cargo spillage, and operate a forklift. In fact, operating a forklift was among her primary responsibilities. Shortly after she began working, one of her supervisors repeatedly told her that women should not be permitted to work in the Maintenance of Way Department. That same supervisor

made insulting and inappropriate remarks to her in front of her co-employees. Sheila White complained to Burlington officials, and the supervisor was suspended for ten days and ordered to attend a sexual harassment training session.

Almost simultaneously, Sheila White was relieved of her forklift duties and reassigned to dirtier, grittier, and more arduous parts of the job. Apparently, her co-workers had complained that a more senior man should have the more desirable job of forklift operator. Sheila White believed that this reassignment was retaliation for complaining about her supervisor's sexually harassing behavior and she filed a retaliation complaint with the EEOC.

Sometime later, Sheila White and her immediate supervisor had a disagreement about which truck should transport her from one location to another. White was suspended without pay for being insubordinate. Sheila White invoked internal grievance procedures and Burlington concluded that she had *not* been insubordinate. She was reinstated and awarded back pay for the thirty-seven days of her suspension. White then filed an additional retaliation charge with the EEOC based on her suspension. Ultimately, a jury returned a verdict of \$43,500 in favor of Sheila White, finding that Burlington's actions of changing her job responsibilities and suspending her for thirty-seven days without pay constituted unlawful retaliation.

The Sixth Circuit, sitting en banc, unanimously affirmed the district court's judgment in favor of White on both retaliation claims, although it disagreed as to the governing standard to apply.⁶ The

⁶ *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 808 (6th Cir. 2004).

Supreme Court granted certiorari to resolve a split in the circuits as to what conduct fits within Title VII's anti-retaliation provision.⁷

The Supreme Court, in a somewhat surprising unanimous decision authored by Justice Breyer, interpreted the anti-retaliation provision of Title VII broadly, holding that it is not limited to discriminatory actions that affect the terms and conditions of employment.⁸ In reaching that result, the Court relied on the linguistic differences between Title VII's core anti-discrimination provision, § 703(a),⁹ and the anti-retaliation provision of § 704(a),¹⁰ and on the differences in the purposes of those two provisions.¹¹

The first, § 703(a), explicitly limits the scope of prohibited discrimination to hiring, firing, compensation, terms, conditions, or privileges of employment.¹² No such limiting language appears in

⁷ *Burlington Northern*, 126 S. Ct. at 2410-11 (discussing the split among the circuits as to what standard to apply). See *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (holding that to constitute a cognizable retaliation claim, the plaintiff must show that the employer's action would have been material to a reasonable employee and it that it would have dissuaded a reasonable employee from making a charge of discrimination); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (holding that the challenged action must result in an adverse effect on the "essential terms, conditions, or benefits of employment"); *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (holding that a plaintiff must establish an "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.").

⁸ *Burlington Northern*, 126 S. Ct. at 2414.

⁹ 42 U.S.C. § 2000e-2(a).

¹⁰ *Id.* § 2000e-3(a).

¹¹ *Burlington Northern*, 126 S. Ct. at 2411-12.

¹² 42 U.S.C. § 2000e-2(a) states in pertinent part:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . with respect to his compensation, terms, conditions, or privileges of employment . . . or to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee

the anti-retaliation provision.¹³ Those textual differences, the Court concluded, were intended by Congress and reflect the different purposes of the two provisions.¹⁴ “The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.”¹⁵

The purpose of prohibiting retaliation against someone who complains of discrimination is to ensure that employees are not deterred from filing discrimination claims out of a fear of reprisals. In order to achieve that objective, the Court concluded that Congress needed to prohibit more than just employment-related actions because an employer can effectively retaliate against an employee by taking actions not directly related to employment or by causing harm to the employee outside the workplace.¹⁶ For example, if the FBI refused to investigate a death threat made against an agent after that agent complained of discrimination, that should be actionable retaliation even though it is not directly related to the workplace.¹⁷ Or if an employer filed a false criminal charge against a former employee who complained about discrimination, that too should be

¹³ *Id.* § 2000e-3(a). Section 2000e-3(a) states: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter” The Court noted the distinction between the two provisions because § 703(a) explicitly limits the scope of the provision “to actions that affect employment or alter the conditions of the workplace” whereas § 704(a) applies no such limitations. *Burlington Northern*, 126 S. Ct. at 2412.

¹⁴ *Burlington Northern*, 126 S. Ct. at 2412.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006)).

considered actionable retaliation even though it does not relate to the terms or conditions of employment.¹⁸ The Court explained:

A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. . . . Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. Plainly, effective enforcement can only be expected if employees [feel] free to approach officials with their grievances.¹⁹

The second issue that the Court addressed was the level of seriousness required before acts of retaliation become actionable. The Court held that the anti-retaliation provision covers those employer actions that would have been materially adverse to a reasonable employee, meaning actions that “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’ ”²⁰ Thus, petty slights or minor annoyances or a simple lack of good manners do not suffice because that conduct would not deter a reasonable employee from reporting discriminatory behavior.

Although this is an objective standard, the Court stressed the importance of context in assessing whether the conduct was materially adverse and offered two examples of how context can matter:

A schedule change in an employee’s work schedule

¹⁸ *Id.* (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

¹⁹ *Burlington Northern*, 126 S. Ct. at 2412, 2414 (quotation omitted).

²⁰ *Id.* at 2415 (quoting *Rochon*, 438 F.3d at 1219).

may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.²¹

Turning to the facts of Burlington's treatment of Sheila White, the Court found that the standard was satisfied when plaintiff was reassigned from forklift duty to standard track laborer tasks and when she was suspended without pay, even though she was eventually reinstated with back pay.²² As to the reassignment, the Court found that "[c]ommon sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."²³ With respect to the suspension without pay, the Court pointed out:

White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. . . . A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite

²¹ *Id.* at 2415-16 (citation omitted).

²² *Id.* at 2416.

²³ *Id.*

suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.²⁴

Justice Alito wrote a concurring opinion but he concurred in the result only.²⁵ He would restrict the anti-retaliation provision to conduct that affects the terms or conditions of employment. In other words, he believes that a retaliation claim must show the same type of materially adverse employment action that is required for a § 703(a) discrimination claim.²⁶ Hence, we see Justice Alito setting himself apart from the rest of the Court early in his tenure.

The reaction to the decision in *Burlington Northern* underscores its significance. One article, entitled *Supreme Headache for Employers*, explained that employers worry that this decision will dramatically increase the number of retaliation claims, which are up approximately fifteen percent since 1992.²⁷ That prediction is accurate because prior to *Burlington Northern*, the majority of federal courts had required that the conduct rise to the level of either a discharge or cut in pay before it could be actionable.²⁸ Employers also indicated that now they will have to be very careful not to subject any employee who has complained about discrimination to

²⁴ *Burlington Northern*, 126 S. Ct. at 2417.

²⁵ Justice Alito found both the reassignment of job responsibilities and the suspension without pay to be adverse employment actions within his interpretation of the statute. *Id.*

²⁶ *Id.* at 2421 (Alito, J., concurring).

²⁷ John Myers, *Supreme Headache for Employers?: High Court Ruling Could Clear Way for More Employee Discrimination Suits*, PITTSBURGH POST-GAZETTE, July 18, 2006, at A-14; see also Barbara Rose, *High Court Widens Protection for Workers Against Retaliation*, CHICAGO TRIBUNE, June 23, 2006, at 5.

²⁸ Joan Biskupic, *Court Eases Worker Lawsuits; Issue is Retaliation After Complaints*, USA TODAY, June 23, 2006, at 1A.

any adverse employment action.²⁹ And the likelihood is that more cases will proceed to trial than be resolved at the summary judgment stage because the Court's decision stressed factual context—a more fact dependent inquiry.

Advocates for employees, of course, celebrated the decision, with Sheila White's attorney saying, "the ruling allows workers who face bias on the job to complain without fear of both subtle or serious retaliation."³⁰ Further, the co-president of the National Women's Law Center said, "If the Court had upheld the standard urged by the railroad and the administration, it would have created a hole in civil rights protections big enough to drive a forklift through."³¹

Before leaving this case, I should point out that the reach of this decision is unlikely to be confined to Title VII. Other federal civil rights statutes prohibit retaliation—such as the Americans with Disabilities Act ("ADA")³² and the Age Discrimination in Employment Act ("ADEA"),³³ so it will be interesting to see whether this decision is incorporated there. The anti-retaliation provision of

²⁹ E.J. Graff, *Striking Back-The Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case; But will the Lower Courts Turn Victory into Defeat?*, BOSTON GLOBE, Sept. 3, 2006, at D1.

³⁰ Biskupic, *supra* note 28, at 1A.

³¹ Charles Lane, *Court Expands Right to Sue Over Retaliation on the Job*, WASH. POST, June 23, 2006, at A16.

³² 42 U.S.C. § 12203(a) (2000) states in pertinent part: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."

³³ 29 U.S.C. § 623(d) (2000) retaliation provision states:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, . . . because such individual, . . . has opposed any practice made unlawful by this section, or because such individual, . . . participated in any manner in an investigation, proceeding, or litigation under this chapter.

Title VII is virtually identical to a provision under the New York State Human Rights Law and New York courts have pretty consistently applied Title VII case law.³⁴ My guess is that the decision in *Burlington Northern* will be found applicable to state law claims as well.

B. Arbaugh v. Y & H Corp.

The second Title VII case of last Term was *Arbaugh v. Y & H Corp.*³⁵ The question in *Arbaugh* was whether the statutory definition of employer goes to the subject matter jurisdiction of the court or whether it is an issue that goes to the merits of the case. This is an important distinction, as Jennifer Arbaugh learned.

She worked as a waitress at a New Orleans café and quit when one of the owners repeatedly made lewd comments, exposed himself, and grabbed her. There was nothing subtle here. She brought and won a Title VII case, but two weeks after the jury verdict, the employer filed a Rule 12(h)(3) motion. In this motion the employer argued that the court lacked subject matter jurisdiction

³⁴ N.Y. EXEC. LAW § 296 (1)(e) (McKinney 2006) states:

It shall be an unlawful discriminatory practice: {f}or any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

See, e.g., *Ferraro v. Kellwood Co.*, 440 F.3d 96, 99-100 (2d Cir. 2006) (explaining that the federal burden-shifting framework established for discrimination claims applies to the New York State and New York City Human Rights Laws); *Borski v. Staten Island Rapid Transit*, No. 04CV3514, 2006 WL 3681142, at *2 n.3 (E.D.N.Y. 2006) (explaining that New York courts rely on federal law when determining claims under the New York Human Rights Law).

³⁵ *Arbaugh*, 126 S. Ct. 1235.

because it did not have fifteen employees as is required under Title VII. The trial court stated the obvious: "it was 'unfair and a waste of judicial resources' to grant the motion to dismiss."³⁶ However, because the trial court believed that the fifteen-plus requirement was jurisdictional, the court permitted post-verdict discovery on the question of how many employees Y & H Corp. employed. That turned out to be a tricky question because of the status of eight delivery drivers and the owner-managers and their shareholder spouses. Ultimately, the court concluded that Y & H did not employ fifteen or more employees and dismissed the case with prejudice on the ground that it lacked subject matter jurisdiction.³⁷ By then, the statute of limitations had expired on Jennifer Arbaugh's claim. The Fifth Circuit affirmed.³⁸ Yet, other circuits, including the Second Circuit had held that the numerosity requirement is not jurisdictional.³⁹

The Supreme Court held, in a unanimous opinion written by Justice Ginsburg (with Justice Alito not participating), that the numerosity requirement constitutes an element of plaintiff's claim,

³⁶ *Id.* at 1238.

³⁷ *Id.*

³⁸ *Arbaugh v. Y & H Corp.*, 380 F.3d 219, 224-25 (5th Cir. 2004) (holding that the numerosity requirement under Title VII is jurisdictional).

³⁹ *See, e.g., Nesbit v. Gear's Unlimited, Inc.*, 347 F.3d 72, 76-83 (3d Cir. 2003) (holding that the numerosity requirement of Title VII is not jurisdictional); *Da Silva v. Kinsho International Corp.*, 229 F.3d 358, 361-66 (2d Cir. 2000) (holding that Title VII's jurisdictional requirement is not jurisdictional); *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-24 (D.C. Cir. 1997) (holding that the numerosity requirement of the Americans with Disability Act, like Title VII, is not jurisdictional); *Armbruster v. Quinn*, 711 F.2d 1322, 1335 (6th Cir. 1983) (holding that Title VII's numerosity requirement is not a jurisdictional issue).

not a jurisdictional requirement, and therefore can be waived if not raised.⁴⁰

The opinion is something of an apology for the Court's lack of care in throwing these terms around. "Jurisdiction," we are told, "is a word of many, too many, meanings."⁴¹ And, Justice Ginsburg admitted that the Court has been less than meticulous in distinguishing jurisdiction from necessary ingredients of a claim, by referring to the Court's "drive-by jurisdictional rulings" where the Court has failed to carefully consider whether the dismissal was really for jurisdictional reasons or for failure to state a claim.⁴²

In concluding that the numerosity requirement of Title VII is not jurisdictional, the Court threw the ball back to Congress saying that if it wants to make it jurisdictional it certainly can:

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.⁴³

C. Ash v. Tyson Foods, Inc

The third Title VII case of last Term, which dealt with

⁴⁰ *Arbaugh*, 126 S. Ct. at 1238-39.

⁴¹ *Id.* at 1242 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998)).

⁴² *Id.*

⁴³ *Id.* at 1245 (quotation and citation omitted).

pretext, was *Ash v. Tyson Foods, Inc.*⁴⁴ You will remember that in disparate treatment cases where the plaintiff is attempting to prove discrimination by circumstantial evidence, the *McDonnell-Douglas*⁴⁵ three stage formulation is used.⁴⁶ In the first stage, the plaintiff makes out a prima facie case by simply proving that he or she was a member of a protected class, applied for and was qualified for a job, was not given the position, and the employer continued to interview candidates with plaintiff's qualifications.⁴⁷ At the second stage, the employer must come forward with a non-discriminatory reason for the adverse employment action.⁴⁸ In the third stage, the plaintiff has the opportunity to demonstrate that the employer's reason was a mere pretext for discrimination.⁴⁹

Anthony Ash and John Hithon, both African-American, were superintendents at a poultry plant with fifteen and thirteen years of experience, respectively. They sought promotions to fill two open manager positions, but the jobs were offered to two white candidates

⁴⁴ *Ash*, 126 S. Ct. 1195.

⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

⁴⁶ *Id.* at 802.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

Id.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 802, 804.

who had much less experience. The plaintiffs alleged race discrimination in violation of Title VII and won compensatory and punitive damages at trial. The issue before the Supreme Court involved the standard for determining whether an employer's asserted non-discriminatory reason was pretextual.

The employer had argued that it simply chose a better qualified candidate. Plaintiffs introduced evidence that their qualifications were superior to those of the two successful candidates. The Eleventh Circuit Court of Appeals found plaintiffs' evidence to be insufficient and held that "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"⁵⁰ The Supreme Court, in a per curiam opinion, rejected that standard, finding it "unhelpful and imprecise."⁵¹ Unfortunately, the Court determined that this was not the occasion to define more precisely the standard that should govern pretext claims based on superior qualifications. Thus, all we learn from this case is that where an employer maintains that it chose a better qualified candidate, the plaintiff may, under certain circumstances, prove pretext by showing that the plaintiff was in fact better qualified⁵² and the court may not impose a standard requiring that the disparity in qualifications to be so apparent as to "jump off the page and slap you

⁵⁰ *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005) (quoting *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

⁵¹ *Ash*, 126 S. Ct. at 1197 ("The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.").

⁵² *Id.* ("Under this Court's decisions, qualifications evidence may suffice, at least in some

in the face.”⁵³

Another aspect of the case concerned the employer’s use of the term “boy” to refer to each of the plaintiffs. The Eleventh Circuit had refused to treat that as evidence of discriminatory animus without a modifier making clear it was meant to have a racial connotation.⁵⁴ The Supreme Court disagreed, explaining that the use of the word, given its historical baggage, can be probative of bias on its own.⁵⁵

II. SECTION 1981: DOMINO’S PIZZA, INC. V. McDONALD

The next case that I would like to discuss concerns § 1981—a statute less well known than Title VII, but one that is also intended to combat race discrimination. Section 1981 originated in § 1 of the Civil Rights Act of 1866⁵⁶ and the date tells you a lot about its purpose. This statute was a part of the package of Reconstruction Era legislation designed to eradicate the invidious Black Codes that had sprung up in the south in the aftermath of the Civil War. The Black Codes had perpetuated a kind of slavery, described as a twilight zone

circumstances, to show pretext.”).

⁵³ *Id.* at 1198 (“This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications.”).

⁵⁴ *Ash*, 129 F. App’x at 533 (“While the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, . . . the use of ‘boy’ alone is not evidence of discrimination.”).

⁵⁵ *Ash*, 126 S. Ct. at 1197 (stating that a finding that the speaker may have had discriminatory intent depends on numerous different factors “including context, inflection, tone of voice, local custom, and historical usage”).

⁵⁶ 42 U.S.C. § 1981 (2000) provides in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

between slavery and freedom, something that resembled the South Africa apartheid laws. Section 1981 guarantees all citizens, regardless of race, the same right to enter into and enforce contracts.⁵⁷

The § 1981 case from last Term is *Domino's Pizza v. McDonald*.⁵⁸ This was not a case between two fast food giants, as its title might suggest. Rather, it is a lawsuit brought by John McDonald, an African American owner of a now bankrupt Las Vegas construction company, against Domino's Pizza, in connection with contracts for McDonald to build four new Domino's restaurants in the Las Vegas area and lease them to Domino's.

After McDonald built the first restaurant, the relationship between McDonald and Domino's badly deteriorated. At one point in the course of discussions, the agent for Domino's allegedly said, "I don't like dealing with you people anyway." Domino's eventually canceled the deal on the remaining contracts, which resulted in McDonald's company filing for Chapter 11 bankruptcy. The trustee brought suit against Domino's for breach of contract but inexplicably did not raise a § 1981 claim. The breach of contract claim was settled for \$45,000 and the company gave Domino's a full release.

McDonald then brought suit in his personal capacity under § 1981 claiming that Domino's had broken its contract with him because of racial animus and that as a result of the breach, he had sustained crushing monetary losses as well as emotional distress. The

⁵⁷ *Id.*

⁵⁸ *Domino's Pizza*, 126 S. Ct. 1246.

district court dismissed his claim finding that while a corporation may have standing to bring the § 1981 claim, a president or sole shareholder may not step into the shoes of the corporation and assert that claim personally.⁵⁹ The Ninth Circuit reversed, concluding that an injury suffered only by the corporation would not permit a shareholder to bring a § 1981 action, but when there are injuries distinct from that of the corporation, a non-party like McDonald may bring a suit under § 1981.⁶⁰ The Supreme Court granted certiorari to resolve a split in the circuits on the issue of whether a non-party to a contract may bring a suit pursuant to § 1981.⁶¹

Justice Scalia wrote for a unanimous court (with Justice Alito not participating) and concluded that only a person with rights under an existing or proposed contract can sue under § 1981.⁶² “Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else’s.”⁶³ The decision rests on what the Court considered straightforward principles of corporation and agency law—a shareholder or contracting officer of a corporation has no rights and is exposed to no liability under the corporation’s contracts.

What is the significance of this holding? In the majority of

⁵⁹ *Id.* at 1248-49.

⁶⁰ *McDonald v. Domino’s Pizza, Inc.*, 107 Fed. App’x 18, 19 (9th Cir. 2004) (“McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc.”).

⁶¹ *Domino’s Pizza*, 126 S. Ct. at 1247, 1249.

⁶² *Id.* at 1252.

⁶³ *Id.*

cases, I suppose, the interests of the corporation and the shareholders and officers will be aligned and the § 1981 claim will be asserted by the corporation—assuming the Supreme Court ultimately holds that a corporation may bring suit under § 1981.⁶⁴ But where the interests of the two are not aligned, this decision prevents the individual who has been the subject of discrimination from seeking redress. In John McDonald's words, the decision punishes small black business owners for choosing to do business in the corporate form. The Court's answer is that some sorts of discriminatory actions will be covered by other statutes, and besides, "nothing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice."⁶⁵

III. THE IDEA

The last two cases I want to discuss involve the IDEA, the Individuals with Disabilities Education Act.

A. *Schaffer v. Weast*

A case that has been described as "one of the most important education cases to reach the Supreme Court in recent years" is *Schaffer v. Weast*.⁶⁶ *Schaffer* dealt with the question of who bears the burden of persuasion at hearings challenging the Individualized Education Program ("IEP") that school districts are required to

⁶⁴ The Court explicitly declined to reach that issue but noted that the courts of appeals that have considered that question, including the Second Circuit, have held that corporations can bring § 1981 claims. *Id.* at 1248 n.1.

⁶⁵ *Id.* at 1252.

⁶⁶ *Schaffer*, 126 S. Ct. 528; see Charles Lane & Lori Aratani, *In Special-Ed Case, Court*

develop for special education students. There are more than 6.7 million students who receive special educational services pursuant to the Act, roughly 13.4% of the national public school population—so this is a case that school districts and parents with disabled children were watching with great interest.⁶⁷

A little background about the statute. The purpose of the IDEA is to ensure a free public education to children with disabilities that is tailored to meet their needs.⁶⁸ In exchange for federal funding, school officials are required to identify and evaluate disabled children, to create an IEP, and to evaluate the IEP every year.⁶⁹ The IEP must include an assessment of the child's current educational performance, must articulate educational goals, and must specify the nature of the special services that the school will provide.⁷⁰ If parents are dissatisfied with the IEP, they may request a hearing.⁷¹

The statute, while silent on the question of who bears the burden of proof at the hearing, does address other aspects of the hearing process. For example, the statute imposes minimal pleading standards, requiring parties to file complaints setting forth a description of the nature of the problem and a proposed resolution of the problem.⁷² All parties may be accompanied by counsel and may present evidence and confront, cross-examine, and compel the

Backs Montgomery Schools, WASH. POST, Nov. 15, 2005, at A01.

⁶⁷ See Lori Aratani & V. Dion Haynes, *D.C. Schools See Opportunity to Pare Back*, WASH. POST, Nov. 15, 2005, at A09.

⁶⁸ 20 U.S.C. § 1400(d)(1)(A).

⁶⁹ *Id.* § 1414(a); § 1412(a)(3)(A).

⁷⁰ *Id.* § 1414(a), (d).

⁷¹ *Id.* § 1415(f)(1)(A).

⁷² *Id.* § 1415(f).

attendance of witnesses.⁷³ After the hearing, any aggrieved party may bring a civil action in state or federal court.⁷⁴ And, prevailing parents may recover attorney's fees—a provision that forms the basis of the second IDEA case of the Term.⁷⁵

Brian Schaffer, the child at the heart of this dispute, suffers from Attention Deficit Hyperactivity Disorder. He attended private school through seventh grade, but in 1997, his parents contacted the local school system and sought a public school placement. Brian was evaluated by the school which developed an IEP that offered him a place in either of two middle schools. The parents were dissatisfied with the placements, believing that he required smaller classes and more intensive services. The parents placed Brian in a private school and sought a hearing challenging the IEP.

After the three day hearing, the ALJ concluded that the evidence was close, but ruled in favor of the school district because the parents bore the burden of persuasion. The parents brought a civil action in federal district court which reversed, finding that the burden is on the school district, but that was reversed by the Fourth Circuit.⁷⁶

Interestingly, attorneys general in nine states submitted an amicus brief, which argued that the burden should be placed on the school district as a matter of fundamental fairness since it is the

⁷³ 20 U.S.C. § 1415(h).

⁷⁴ *Id.* § 1415(g).

⁷⁵ *Id.* § 1415(i)(3)(B).

⁷⁶ *Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004) (“[T]he IDEA does not allocate the burden of proof, and we see no reason to depart from the general rule that a party initiating a proceeding bears that burden.”).

school that controls the relevant educational data.⁷⁷ Also, it is interesting to note that the United States changed its position on this issue. Under the Clinton Administration, the Justice Department had supported the parents.⁷⁸ But by the time the case reached the Supreme Court, seven years later, the Bush Administration had reconsidered that position and urged the Court to place the burden on the complaining party.⁷⁹

Justice O'Connor wrote for a six—two majority, with Chief Justice Roberts not participating because his former law firm represented the school district. Justice O'Connor began her analysis by noting “the term ‘burden of proof’ is one of the ‘slipperiest member[s] of the family of legal terms.’ ”⁸⁰ When the question is raised in connection with a statutory claim, the touchstone of the inquiry is the statutory text, which in this case is completely silent on the issue. Thus, the starting point, and in this case, the ending point, becomes the ordinary default rule that plaintiffs typically bear the burden of persuasion regarding the essential elements of their claims.⁸¹

The parents argued that considerations of fairness militate against placing the burden of establishing facts peculiarly within the

⁷⁷ See Nick Anderson, *Bush Administration Supports Montgomery Schools in Lawsuit; Supreme Court to Review Case Involving Special-Ed Options*, WASH. POST, June 28, 2005, at A04.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Schaffer*, 126 S. Ct. at 533 (quoting 2 J. STRONG, MCCORMICK ON EVIDENCE 342 (5th ed. 1999)).

⁸¹ *Id.* at 534.

knowledge of his adversary on a litigant. However, the Court concluded that while schools do have a “natural advantage” in information and expertise, Congress addressed that situation by requiring extensive information sharing with the parents and by providing procedural protections for parents in the hearing process.⁸² Thus, the Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.⁸³ If however, it were the school district seeking to challenge an IEP, something that very rarely happens, the rule would apply with equal force—the school district then would bear the burden of proof.⁸⁴

Justice Ginsburg and Justice Breyer separately dissented. Justice Ginsburg concluded that the burden should be placed on the school district because it would increase the likelihood that the school would design an IEP genuinely tailored to the child’s individual needs.⁸⁵ In fact, that is just what happened to Brian Schaffer. When the district court reversed the ruling of the ALJ and found that the burden should be on the school board, the school redesigned the IEP in a way that met Brian’s special educational needs. The IEP required that Brian be immediately transferred from the private high school to the public school where he remained until he successfully graduated.

⁸² *Id.* at 536-37.

⁸³ *Id.* at 537.

⁸⁴ *Id.*

⁸⁵ *Schaffer*, 126 S. Ct. at 538 (Ginsburg, J., dissenting) (“I am persuaded that ‘policy considerations, convenience, and fairness’ call for assigning the burden of proof to the school district in this case.” (quoting *Weast*, 377 F.3d at 457 (Luttig, J., dissenting))).

Justice Breyer dissented for a different reason. He concluded that Congress left the issue of who bears the burden of proof to the states to decide; hence the case should be remanded for a determination of what Maryland's rules of state administrative procedure require.⁸⁶ This position, Justice Breyer concludes, reflects true judicial respect for federalist principles.⁸⁷

This case has enormous significance to school districts across the country and to families with disabled children. Here in Long Island about 11% of children attending public schools are classified as disabled.⁸⁸ Although one can say the question of who bears the burden of proof only matters when the evidence is in equipoise, the reality is quite different, which is why school districts across the country collectively heaved a huge sigh of relief because they feared that a contrary ruling would have cost them millions of dollars in litigation and in special services. The parents' perspective, of course, is that they are at the mercy of the school districts who possess all the expertise and information.

The Court's decision has been criticized by some advocates for disabled children as being too "ivory tower" and not reflecting the realities of the imbalance that exists in the hearing process, particularly when the families are impoverished.⁸⁹ Other disability

⁸⁶ *Id.* at 541 (Breyer, J., dissenting) ("My own view is that Congress took neither approach. It did not decide the 'burden of persuasion' question; instead it left the matter to the States for decision.").

⁸⁷ *Id.* at 542.

⁸⁸ Jennifer Smith, *New Worries for Special Ed Parents*, NEWSDAY (N.Y.), Nov. 24, 2005, at A22.

⁸⁹ Kalman Hettleman, *Special-Education Failures Run Deep*, BALTIMORE SUN, Nov. 18,

rights groups complained that school districts would now be less motivated to work things out with parents and address parent complaints.⁹⁰ One local resident was quoted as saying that when she reads the IEP for her son who has Attention Deficit Hyperactivity Disorder, she has no idea of what most of it means.⁹¹ “ ‘The schools have access to everything, and we just have what our kids tell us, if they can tell us anything’ ” she said.⁹²

Apparently four states, Alabama, Alaska, Delaware, and Minnesota, place the burden of proof on the school districts.⁹³ The Supreme Court did not reach the question of whether or not states may voluntarily place the burden on the school district, so the question of whether the rule must be uniform remains open. The District of Columbia had also placed the burden on the school district, but as soon as the decision in *Schaffer* was announced, the president of the District of Columbia school district immediately announced that their schools would no longer enforce its regulation and would shift the burden to the parents.⁹⁴

B. Arlington Central School District v. Murphy

The last case I want to discuss, which is also an IDEA case, is *Arlington Central School District v. Murphy*.⁹⁵ The issue in

2005, at 19A.

⁹⁰ *Id.*

⁹¹ Smith, *supra* note 88, at A22.

⁹² *Id.*

⁹³ Lane & Aratani, *supra* note 66, at A01.

⁹⁴ *Id.*

⁹⁵ *Arlington*, 126 S. Ct. 2455.

Arlington was whether the fee shifting provision in the IDEA authorizes an award for expert fees. The answer is no, according to Justice Alito, who writes for the majority.⁹⁶ This is an important case, not just on the merits, but for what it tells us about Justice Alito's philosophy of statutory interpretation and for what it tells us about his analysis of conditional spending provisions.

His analysis is straightforward. The IDEA was enacted pursuant to the Spending Clause and although Congress can attach conditions to a spending program, it must set forth those conditions unambiguously so as to give the states notice of their obligations when they accept federal funds.⁹⁷ Since the Court had interpreted other fee shifting statutes to exclude expert fees, the Court found that this statute fails to give the states sufficient notice of their obligations.⁹⁸ That is very important because the Court had not necessarily required that level of specificity in Spending Clause cases before.

The question for Justice Alito was whether the fee shifting provision, which provides "the court, in its discretion, may award reasonable attorneys' fees as part of the costs,"⁹⁹ furnishes clear notice to the states that they may be liable for expert fees. Justice Alito had little difficulty concluding that it does not. He relied

⁹⁶ *Id.* at 2457, 2460 (Alito, J., delivered the opinion of the Court, joined by Roberts, C.J. & Kennedy & Thomas, JJ.).

⁹⁷ *Id.* at 2463. ("In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds.").

⁹⁸ *Id.*

⁹⁹ 20 U.S.C. § 1415(i)(3)(B).

heavily on two previous Supreme Court decisions: *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,¹⁰⁰ where the Court interpreted the term “costs” in the Federal Rules of Civil Procedure 54(d)¹⁰¹ to be limited by the categories of expenses enumerated in 28 U.S.C. § 1920;¹⁰² and *West Virginia University Hospital v. Casey*,¹⁰³ where the Court interpreted the fee shifting statute of the Federal Civil Rights Act¹⁰⁴ to exclude expert witness fees.¹⁰⁵ Since that fee shifting provision is virtually identical to the provision in the IDEA, in order to rule in favor of the parents here, the Court “would have to . . . hold that the

¹⁰⁰ 482 U.S. 437 (1987).

¹⁰¹ FED. R. CIV. P. 54(b) states:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

¹⁰² 28 U.S.C. § 1920 (2000):

A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

¹⁰³ 499 U.S. 83 (1991).

¹⁰⁴ 42 U.S.C. § 1988(c) states: “In awarding an attorney’s fee under subsection (b) of this section in any action or proceeding to enforce a provision of sections 1981 or 1981A of the Revised Statutes . . . , the court, in its discretion, may include expert fees as part of the attorney’s fee.”

¹⁰⁵ *Casey*, 499 U.S. at 97.

relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in . . . § 1988 was held to mean in *Casey*.”¹⁰⁶ In light of these decisions, Justice Alito concluded that the IDEA does not give the states unambiguous notice regarding their liability for expert fees.¹⁰⁷

However, the case is not as straightforward as it initially appears. It turns out that the legislative history clearly indicates Congress’ intent to encompass expert fees. The Conference Committee report unambiguously states “ ‘[t]he conferees intend that the term attorneys fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.”¹⁰⁸ Justice Alito responded by saying:

[W]here everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey*, we cannot say that the legislative history . . . is sufficient to provide the requisite fair notice.¹⁰⁹

Justice Ginsburg filed a concurring opinion in which she

¹⁰⁶ *Arlington*, 126 S. Ct. at 2462.

¹⁰⁷ *Id.* at 2463.

¹⁰⁸ *Id.* (quoting H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.)).

¹⁰⁹ *Id.* at 2463.

disagreed with the clear notice requirement applied to the IDEA but otherwise agreed with the Court's interpretation of the statutory language.¹¹⁰

Justice Breyer, Stevens, and Souter dissented largely on the strength of the legislative history. Justice Breyer stated: "I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended."¹¹¹ Justice Breyer's philosophy regarding statutory interpretation is thus diametrically opposed to Justice Alito's. To Justice Breyer, ascertaining legislative intent *is* a part of the task, "[o]nly by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate interpretation, upon which the legitimacy of our constitutional system rests."¹¹² Justice Breyer concluded by faulting the majority for divorcing law from life.¹¹³

The dissent also argued that the purpose of the IDEA, to provide a free public education for children with disabilities, will be undermined by failing to pay expert fees because it will leave many parents " 'without an expert with the firepower to match the opposition.' "¹¹⁴ And, the dissent took issue with the majority's requirement that every detail in Spending Clause legislation must be

¹¹⁰ *Id.* at 2465 (Ginsburg, J., concurring).

¹¹¹ *Arlington*, 126 S. Ct. at 2466 (Breyer, Stevens & Souter, JJ., dissenting).

¹¹² *Id.* at 2474.

¹¹³ *Id.* at 2475.

¹¹⁴ *Id.* at 2470 (quoting *Schaffer*, 126 S. Ct. at 536).

spelled out with unusual clarity.¹¹⁵

IV. CONCLUSION

Let me end by simply calling your attention to what is likely to be the two blockbuster civil rights cases for next Term. They are the two school integration cases: *Meredith v. Jefferson County Board of Education*¹¹⁶ and *Parents Involved in Community Schools v. Seattle School District*.¹¹⁷ Both involve voluntary school integration efforts, but the cases could permit a revisiting of the recent *Grutter*¹¹⁸ decision on affirmative action based on the change of membership in the Court.

¹¹⁵ *Id.* at 2471.

¹¹⁶ No. 05-915 (U.S. argued Dec. 4, 2006).

¹¹⁷ No. 05-908 (U.S. argued Dec. 4, 2006).

¹¹⁸ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).