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Discrimination Cases in the 2001 Term of the Supreme Court (Symposium: The Fourteenth Annual Supreme Court Review)

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Recommended Citation

19 Touro L. Rev. 71 (2002-2004)

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DISCRIMINATION CASES IN THE 2001 TERM OF THE SUPREME COURT

Eileen Kaufman[1]

Discrimination cases figured prominently in the Supreme Court's docket last year, with five of the seven discrimination cases considering the application of the Americans with Disabilities Act (ADA).[2] The twelve year old statute is widely considered the most significant civil rights statute of the past quarter century.[3] In fact, the number of cases considered by the Court led Justice O'Connor to speculate that the 2001 term could be "remembered as the disabilities act term."[4] The Supreme Court's decisions in four of the five ADA cases continued the Court's pattern of restricting the scope of the ADA by interpreting the statute in a manner benefiting employers.[5] However, the term

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[2] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12111-12213 (2000)).

[3] *See* Linda Greenhouse, *The High Court's Target: Congress,* N.Y. TIMES, February 25, 2001, Section 4, at 3; *see also* Paul Stephen Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation,* 19 TRANSP. L.J. 309, 310 (1991) (wherein the author makes reference to the Americans With Disabilities Act of 1990 as the most sweeping civil rights legislation in a quarter century); Stephen L. Percy, *Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans With Disabilities Act,* 21 BERKELEY J. EMP. & LAB. L. 413, 432 (2000) (citing James J. Weisman, *Teeth in the ADA,* WE MAGAZINE, Sept.-Oct. 1998, at 114).

[4] Charles Lane, *O'Connor Criticizes Disabilities Law as too Vague,* WASH. POST, March 15, 2002, at A2. (quoting Justice O'Connor).

[5] *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (holding that carpal tunnel syndrome did not qualify as a substantial limitation on a major life activity and thus was excluded as a disability under the ADA); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002) (holding that the protections afforded under the ADA are secondary to the rights of employees under a seniority system of personnel placement); Chevron, U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002) (upholding an EEOC regulation that gave employers the authority to

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was not a clean sweep for employers because in three less publicized but nevertheless important employment discrimination cases, it was the employees who scored significant victories.[6]

The ADA was enacted by Congress in 1990 and prohibits discrimination against the disabled in employment, in public services and in public accommodations.[7] Congress passed the Act convinced that disability discrimination was a pervasive problem.[8] Among the many cases presented to Congress while it considered enactment of the legislation were: a state's refusal to hire cancer victims for at least five years after the patient's last treatment because a government official mistakenly believed that cancer was contagious; a public school's refusal to hire a deaf teacher at a school for the deaf because she lacked listening skills; and a zoo's

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terminate or otherwise reject an application to transfer job titles of an employee with a medical condition that would worsen due to job conditions); Barnes v. Gorman, 536 U.S. 181 (2002) (holding that municipalities are not subject to punitive damages in private ADA cases). The one ADA case that did not benefit employers was *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002), which held that the EEOC is not barred from pursuing specific relief, such as back pay, reinstatement and damages, in an ADA enforcement action, despite an agreement between an employer and employee to arbitrate employment related disputes.

[6] *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (holding that charges alleging hostile work environment will not be barred if filed outside the statutory time period if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period); Edelman v. Lynchburg College, 535 U.S. 106, 108-09 (2002) (holding that petitioner's claim that he was denied tenure on the basis of gender, national origin and religious discrimination was not barred merely because his original claim was not verified within the statutory period provided under §706(b) of Title VII of the Civil Rights Act of 1964); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002) (holding that a short, plain statement alleging the grounds for discrimination was sufficient pleading pursuant to Federal Rules of Civil Procedure 8(a) to seek relief).

[7] Title I of the ADA covers employment, sec. 101-108, 42 U.S.C. §§ 12111-12117; Title II of the ADA covers public services, sec. 201-246, 42 U.S.C. §§ 12131-12165; Title III of the ADA covers public accommodations and services operated by private entities, sec. 301-310, 42 U.S.C. §§ 12181-12189.

[8] *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 380 (2001) (stating that "Congress expressly found substantial unjustified discrimination against persons with disabilities.").

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expulsion of children suffering from Down's Syndrome because the zookeeper feared such children would upset the chimpanzees.[9]

Following the enactment of the ADA, the Court was presented with a number of opportunities to interpret the scope of the Act as it relates to employment discrimination. The Court's decisions have led one disability advocate to refer to the ADA as "the incredible shrinking law."[10] In 1999, the Court held that a person whose impairment is correctable is not disabled within the meaning of the law.[11] So, for example, a pilot with severe vision problems that can be remedied by contact lenses is not disabled within the meaning of the Act and when the airline terminates the employee due to her impairment, she is without a remedy under the Act.[12] The result is the same for someone whose hypertension is treatable with medication.[13] This creates something of a "catch-22" in that a person who is too disabled to work is not protected by the Act, but a person whose disability can be remedied in a way that permits her to work is also unprotected by the Act. And, in another case restricting the scope of the ADA, the Court held that Congress exceeded its power when it subjected the states to suit by disabled workers.[14]

This year's decisions serve to narrow even further the reach of the ADA. The Court held that a person who is unable to perform her assigned work due to carpal tunnel syndrome is not disabled within the meaning of the Act.[15] Additionally, the Court concluded that a seniority system typically trumps the ADA's requirement of accommodating disabled workers,[16] and that an employer need not hire a disabled individual if the position poses risks to the employee's own health.[17] Finally, the Court

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[9] *See id.* at 381-82 (Breyer, J, dissenting) (citing Congressional record).

[10] Joan Biskupic, *High Court Raises Bar for ADA,* USA TODAY, Jan. 9, 2002, at A3.

[11] Sutton v. United Airlines, 527 U.S. 471, 475 (1999).

[12] *Id.* at 475.

[13] Murphy v. United Parcel Service, 527 U.S. 516, 518 (1999).

[14] Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. at 360.

[15] *Toyota,* 534 U.S. 184.

[16] *U.S. Airways*, 535 U.S. 391.

[17] *Chevron*, 536 U.S. 73.

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determined that disabled individuals who succeed in an ADA Title II public entities case cannot recover punitive damages.[18]

It may appear that the Court has heard an unusual number of cases considering the reach of the ADA. Justice O'Connor suggests the reason for the Court's intervention is clear: Congress simply passed the law too quickly, leaving too many uncertainties as to what Congress had in mind.[19] According to Justice O'Connor, speaking at the annual meeting of the Corporate Counsel Institute, the bill's sponsors were "so eager to get something passed" that they wrote a bill less carefully crafted than anything "a group of law professors might put together."[20]

Toyota Motor Manufacturing v. Williams[21]

Ella Williams worked on an assembly line at a Toyota plant.[22] Her job required her to use pneumatic tools and by virtue of the use of those tools she eventually suffered pain in her hands, wrists and arms that was diagnosed as bilateral carpal tunnel syndrome and bilateral tendonitis.[23] Toyota attempted to accommodate her condition, however, Williams was dissatisfied with their efforts and commenced a lawsuit under the ADA.[24] That lawsuit was settled and she returned to work where she was placed in a position requiring her to visually inspect cars as they passed on a conveyor belt and to manually wipe each car with a glove.[25] She worked at that job for a few years without problems but then Toyota added two functions to her job description requiring her to apply and spread a viscous substance resembling salad oil on the passing cars and then inspect each car for flaws.[26] These additional functions required her to hold her arms at shoulder height for

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[18] *Barnes*, 536 U.S. 181.

[19] William C. Smith, *Drawing Boundaries: The Supreme Court is Siding with Employees and Narrowing the Reach of the Americans with Disabilities Act. Is that what the Drafters had in Mind?*, 88 A.B.A.J., 49 (2002).

[20] *Id.*

[21] 534 U.S. 184 (2002).

[22] *Id.* at 187.

[23] *Id.*

[24] *Id.* at 188.

[25] *Id.* at 188-89.

[26] *Toyota*, 534 U.S. at 189.

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several hours a day.[27] Eventually, she experienced pain in her neck and shoulders and was diagnosed as suffering from an advanced type of carpal tunnel syndrome. As a result of the disability she could not do her job and was fired.[28] Williams sued claiming that under the ADA, Toyota was required to provide a reasonable accommodation and it failed to do so.[29]

The issue before the Supreme Court was whether Williams' condition, carpal tunnel syndrome, which indisputably prevented her from performing her job, was a disability within the statutory definition, which would then obligate Toyota to provide a reasonable accommodation.[30] The statute defines disability as a physical or mental impairment that substantially limits one or more major life activities.[31] Equal Employment Opportunity Commission (EEOC) regulations define a substantial limitation as an inability "to perform a major life activity that the average person in the general population can perform."[32] Williams claimed that performing manual tasks was the life activity that was substantially limited.[33]

Justice O'Connor, writing for a unanimous Court, readily agreed that Williams suffered from a physical impairment; but found that the impairment did not substantially limit her in the major life activity of performing manual tasks.[34] Using Webster's Dictionary[35] as a guide, the Court explained the standard by defining its terms. First, the word "substantial" means "considerable" or "to a large extent."[36] Next, the word "major" means "important."[37] Major life activities therefore are those activities that are of actual importance to daily life.[38] In order to

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[27] *Id.*
[28] *Id.* at 189-90.
[29] *Id.* at 190.
[30] *Id.* at 187.
[31] *Toyota,* 534 U.S. at 192 (citing 42 U.S.C. § 12101).
[32] Regulations to Implement the Equal Employment Positions of the Americans with Disabilities Act Definitions, 29 C.F.R. § 1630.2(j) (2002).
[33] *Toyota,* 534 U.S. at 190.
[34] *Id.* at 196.
[35] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1989).
[36] *Toyota,* 534 U.S. at 197 (citing *Webster's*).
[37] *Id.* (citing *Webster's*).
[38] *Id.*

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satisfy this test, individuals claiming to be disabled due to a substantial limitation on the ability to perform manual tasks must establish that they cannot perform the variety of tasks of central importance to most peoples' daily lives. In addition, the impact must be permanent or long term. Thus, the fact that the individual is unable to perform the manual tasks associated with a specific job is insufficient.[39] The Court did not reach the question of whether working is a major life activity. In *Sutton v. United Airlines*, the Court said, even assuming the answer is yes, plaintiff would have to show an inability to work in a broad range or class of jobs, but that kind of class-based framework is inapplicable outside the work context.[40]

Applying that standard to Ella Williams, the Court concluded that the tasks she needed in her job were not an important part of most peoples' daily lives.[41] The record revealed that Williams could tend to her personal hygiene and carry out household tasks; she could brush her teeth, wash her face, bathe, tend to her flower garden, fix breakfast, do laundry and pick up around the house.[42] Those activities, the Court said, are of central importance to peoples' daily lives.[43] The fact that she could not sweep, dance, drive long distances, or be as active in her garden as she desired or interact with her children, did not suffice because those activities are not of central importance to most peoples' lives.[44]

The Court's reasoning in *Toyota* supports a conclusion that an impairment preventing an individual from performing her job but does not prevent her from performing manual tasks of central importance to most peoples' daily lives does not constitute a disability within the meaning of the ADA.[45] Moreover, we are told this test will be applied strictly in order to prevent everyone from being considered disabled.[46] It is perfectly clear that this is the concern driving these decisions, particularly given the statistics

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[39] *Id.* at 200-01.
[40] *Id.* (citing *Sutton*, 527 U.S. at 491).
[41] *Id.* at 200-01.
[42] *Toyota*, 534 U.S. at 201-02.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 200-01.
[46] *Toyota*, 534 U.S. at 197.

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regarding the number of people suffering from repetitive stress disorders like carpal tunnel syndrome.

Outside of the ADA context, there is a real battle being waged with respect to ergonomic injuries and what needs to be done to correct its effects at the workplace. Last year the Bush Administration repealed rules promulgated during the Clinton administration regarding ergonomic injuries.[47] Eugene Scalia,[48] who is the lead attorney for the Labor Department, expressed real skepticism about these types of injuries, dismissing them as "junk science" and "quackery."[49]

The "catch-22" this decision creates is that to be disabled within the meaning of the law, the worker's carpal tunnel syndrome must be sufficiently crippling to prevent her from performing basic life tasks. However, if the condition is that crippling, she is unlikely to be able to perform the job and therefore would not be a qualified worker under the act.[50] As a result, the criticism that many disability advocates raised is a type of "goldilocks" argument where the plaintiff is either not disabled enough or too disabled, leaving not many plaintiffs in the "just right" category.[51]

Disability advocates were not the only critics of this decision. Representative Steny Hoyer (D-Md.), a sponsor of the ADA, wrote an op-ed piece in the Washington Post criticizing the Court for its misreading of legislative intent and vowing to revisit the Act to determine whether, given the Court's restrictive interpretation, it is carrying out the Act's intended purpose.[52]

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[47] Steven Greenhouse, *House Joins Senate in Repealing Rules on Workplace Injuries*, N.Y. TIMES, Mar. 8, 2001, at A19.

[48] United States Associate Justice Antonin Scalia's son.

[49] Dana Milbank, *Recess Appointees Relinquish Title Only; Reich, Scalia Put In Similar Jobs*, WASH. POST, Nov. 23, 2002, at A10 (quoting Eugene Scalia).

[50] *See supra* note 19 (quoting Scott Burris).

[51] *Why Did the Supreme Court Take on Three ADA Cases at Once*, 14 DISABILITY COMPLIANCE BULL. (Jan. 28, 1999).

[52] Steny Hoyer, *Not Exactly What We Intended, Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B1.

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Chevron v. Echazabal [53]

Mario Echazabal worked for twenty years as an independent contractor at Chevron's oil refinery and then applied for a job directly with Chevron.[54] Chevron refused to hire him, and, in fact, directed the contractor to fire him, because the job exposed him to toxins, which created a health risk because he suffered from a liver disorder.[55] Chevron defended its policy of denying employment to persons whose health would be compromised by the job by pointing to the time that would be lost to lateness, to the excessive turnover that would likely result, and to the risk of tort liability and Occupational Safety and Health Administration (OSHA) violations.[56]

This case, unlike *Toyota*, raised no question of disability. Echazabal was clearly disabled within the meaning of the law.[57] The question was whether Chevron's refusal to hire him fit within the affirmative defense available under the ADA for qualification standards shown to be job related and consistent with business necessity.[58] Is refusing to hire someone, or firing a worker, because the job threatens the worker's own health, a discriminatory act under the ADA or is it a job qualification that is both job-related and consistent with business necessity? The statute clearly provides that an employer may refuse to hire someone who poses a direct threat to the health and safety of other individuals in the workplace.[59] However, it does not have a comparable provision for situations where the health threat is to the individual person. The EEOC regulation provides for this exception.[60]

Justice Souter, in yet another unanimous opinion, upheld the regulation, rejecting the application of the maxim "*expressio unius exclusio alterius,*" which translates, more or less, into

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[53] Chevron v. Echazabal, 536 U.S. 73 (2002).

[54] *Id.* at 76.

[55] *Id.* at 76-77.

[56] *Id.* at 83, 29 U.S.C. §§ 651-666 (2000).

[57] *Chevron*, 536 U.S. at 78 n.2.

[58] *Id.* at 78-79, 42 U.S.C. § 12113(a) (2000) The statute provides that "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

[59] *Id.* at 78-79, 42 U.S.C. § 12113(b) (2002).

[60] 29 C.F.R. § 1630.2(r) (2002).

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"expressing one item excludes another left unmentioned."[61] The Court concluded that Congress did not intend to limit the statutory defense to situations where the worker posed a threat to other workers on the job.[62] Did Congress really mean that if a meat packer refused to hire Typhoid Mary,[63] he would be liable under the ADA?

This case posed an interesting question: whether permitting this type of "threat to self" defense constitutes just the sort of paternalism that the ADA was intended to eliminate. The Court declares no. Rather, the Act was intended to prevent employers from refusing to hire classes of disabled persons "for their own good" based on untested and pretextual stereotypes.[64] Permitting a prospective employer to refuse to hire a potential employee based on a direct threat to the employee's own health is not discrimination masquerading as protection because this defense requires an individualized assessment of the health risks posed to this employee.[65] However, the Court does not tell us how imminent or how severe the harm must be. In a footnote, the Court states,

> [W]e have no occasion . . . to try to describe how acutely an employee must exhibit a disqualifying condition before an employer may exclude him from the class of the generally qualified. This is a job for the trial courts in the first instance.[66]

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[61] *Chevron*, 536 U.S. at 80.

[62] *Id.* at 79.

[63] Mary Mallon, a cook who worked in New York, was nicknamed "Typhoid Mary" after being diagnosed with typhoid in 1904. Despite the disease, she moved from job to job handling food and infecting the innocent until she was caught in 1907. She was committed to an institution until 1910. In all, authorities attributed 51 cases and three deaths to "Typhoid" Mary." Mary Mallon died in 1938, but not from typhoid. She was immune to the disease. *See* Encarta Encyclopedia *at* http://encarta.msn.com/column/womenshistory.asp.

[64] *Chevron*, 536 U.S. at 85; *See also id.* at 86 n.5 (referring to concerns expressed in the legislative history of the ADA, that employers must assess the risk exposure within the workplace as it affects a particular individual, rather than the effect of such risks on a group or category of persons with a certain disability).

[65] *Id.* at 86 (citing 29 C.F.R. § 1630.2(r)).

[66] *Id.* at 86 n.6.

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Future litigation will be necessary to put some meat on this bare bones "direct threat" standard.

One interesting comparison is to the Title VII[67] gender cases. There, the Court has seemingly disallowed a defense based on the need to protect female employees.[68] For example, in one case *Dothard v. Rawlinson*,[69] the Court upheld a prison regulation preventing women from working as prison guards in a maximum security prison based on the presence of sex offenders in the population.[70] The Court emphasized that its decision was not based on harm to the women alone, but rather on the threat of harm to others.[71] And, in another case *International Union v. Johnson Controls*,[72] the Court repeated the requirement that the harm must be to third parties in striking down an employer's policy of not permitting women of child-bearing age from working in its battery plant.[73] Protecting the not yet conceived fetuses of the female employees was not a bona fide occupation requirement because such fetuses are neither customers nor third parties whose safety is essential to the business of battery manufacturing.[74] The reasoning of the Title VII gender cases is not adopted in *Chevron* and instead the defense based on threat to the employee is upheld even though there was no third party threatened.[75]

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[67] 42 U.S.C. § 2000(e) (2000).

[68] *See, e.g.*, Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) (holding that a company policy excluding women of childbearing years from certain jobs is sexual discrimination under Title VII unless a company can establish that sex is a "bona fide occupational qualification").

[69] 433 U.S. 321 (1977).

[70] *Id.* at 336-37.

[71] *Id.* at 336.

[72] 499 U.S. at 187.

[73] *Id.* at 216-17 ("[A]voidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's 'normal operation' of its business").

[74] *Id.* at 203 (acknowledging the need to protect injury to the unborn, but refusing to extend the *bona fide* occupational qualifications to prevent the potential commission of a battery).

[75] *Chevron*, 536 U.S. at 87.

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U.S. Airways, Inc. v. Barnett[76]

The unanimity of the last two cases is nowhere in evidence in the third ADA case of the term, *U.S. Airways v. Barnett*, where instead we find a sharply fractured Court.[77] The issue in *Barnett* was whether an employer's obligation to provide a reasonable accommodation to a disabled worker is trumped by a seniority system.[78] This is one of the first times that the Court has had the occasion to consider the reasonable accommodation requirement.[79]

Roger Barnett worked as a cargo handler for U.S. Airways until he injured his back.[80] He transferred to a less demanding position in the mailroom.[81] Two years later, U.S. Airways announced that this position would be subject to seniority-based employee bidding and Barnett subsequently lost his position to an employee with more seniority.[82] Barnett sued, claiming that U.S. Airways violated the ADA by invoking its seniority system to trump its obligation to provide a reasonable accommodation.[83]

The Supreme Court was faced with conflicting authority from the circuit courts, with some holding that seniority systems always trumped the disabled person's rights, and others requiring a case by case determination.[84] The test that the Supreme Court

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[76] U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[77] Chief Justice Rehnquist and Justices Stevens, O'Connor and Kennedy joined in the majority decision authored by J. Breyer. Justices Scalia, Souter, Thomas and Ginsburg dissented.

[78] *Barnett,* 535 U.S. at 394.

[79] *Id. See* 42 U.S.C. § 12112 (b) and (5)(A) which states in pertinent part: The term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

[80] *Barnett,* 535 U.S. at 394.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 395-96.

[84] *Compare* EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001) (holding that the ADA does not require an employer to deviate from its nondiscriminatory seniority policy in order to accommodate a worker) *with* U.S. Airways, Inc. v. Barnett, 228 F.3d at 1120 (9th Cir. 2000) (holding that cases should be determined on a case by case basis).

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announced forges a middle ground between these two positions.[85] Justice Breyer, writing for a bare majority, an extremely bare majority as I'll explain in a moment, concluded that a "seniority system would prevail in the run of cases."[86] Ordinarily, the fact that a requested accommodation conflicts with the rules of a seniority system demonstrates that the accommodation is not reasonable.[87] That showing entitles the employer to summary judgment.[88] However, the plaintiff has the opportunity to present evidence of "special circumstances that make 'reasonable' a seniority rule exception in the particular case."[89] The test is essentially a rebuttable presumption. A proposed accommodation that conflicts with a seniority system is presumably unreasonable but the employee has the chance to show otherwise by proving special circumstances.[90] What kind of special circumstances might suffice? It might suffice where the employer has retained the right to change the seniority system unilaterally and exercises that right frequently or where the seniority system contains so many exceptions that recognizing another one would not matter.[91] One last point about Justice Breyer's opinion that is vitally important is that this decision is not limited to seniority systems that are collectively bargained.[92] It also covers those, like the seniority system at U.S. Airways, that are unilaterally imposed by management.

Of the five opinions in *Barnett*, the single most important may well be Justice O'Connor's concurring opinion.[93] The rule that Justice O'Connor favors is that the effect of a seniority system on the reasonableness of an accommodation depends on whether the seniority system is legally enforceable.[94] This is a very different rule than that articulated by Justice Breyer. Why then did she join his opinion? She explains.

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[85] *Barnett*, 535 U.S. at 396.
[86] *Id.* at 394.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Barnett*, 535 U.S. at 394.
[91] *Id.* at 399.
[92] *Id.* at 404.
[93] *Id.* at 408-12 (O'Connor, J., concurring).
[94] *Id.* at 408 (O'Connor, J., concurring).

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> If each member [of the Court] voted consistently with his or her beliefs, we would not agree on a resolution of the question presented in this case . . . In order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns.[95]

Why will the Court's test likely lead to the same outcome? An unenforceable seniority system typically gives employers the right to change the system, typically permits exceptions, and typically contains disclaimers that reduce employee expectations that the system will be followed.[96]

This concurrence could well muddy the waters because lower courts counting votes, may look to Justice O'Connor's rule. She recently defended her practice of adding the fifth vote and then writing a separate concurrence articulating a narrower rule. "If you're going to be the majority vote, qualifying your position and saying 'I agree to this extent only' has the effect of narrowing the holding and that's not always a bad thing."[97] "It might be a valuable thing to pull back. The Court moves in small steps and sometimes that is healthy if you don't take a giant step all at once so you can see how that doctrine is going to pan out."[98] It will be interesting to see how this pans out in the lower courts.

What is the likely effect of the Court's decision? Walter Dellinger, who represented US Airways, said, "All truly bona fide company seniority systems will survive the test the Court sketched out" in its decision.[99] That is certainly true with respect to collectively bargained seniority systems. But, the answer is far less certain for seniority systems that are unilaterally imposed, like

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[95] *Id.*

[96] *Id.* at 409-10.

[97] *See* Lane, *supra* note 4.

[98] *Id.*

[99] Charles Lane, *Justices Further Limit Scope of Disability Act; Law Doesn't Trump Seniority Policies,* WASH. POST, April 30, 2002, at A4 (quoting Walter Dellinger).

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the one at issue in US Airways, systems that are non-contractual and modifiable at will. While advocates for the disabled were disappointed by the decision, they readily admitted that it was not a total loss for disability plaintiffs. This is true because the rule in many circuits was that seniority plans automatically trumped the disabled employee's rights, and that is no longer true under either Justice Breyer's formulation of the rule or Justice O'Connor's.[100]

Before we leave *Barnett*, just a couple of words about the other opinions. There were two dissents in the case, one written by Justice Scalia,[101] joined by Justice Thomas, and the other written by Justice Souter,[102] joined by Justice Ginsburg. The first argues for a bright line rule whereby all seniority systems trump the obligation to provide accommodations,[103] and the second argues for a rule that generally does not permit seniority systems to interfere with accommodations for the disabled.[104]

Scalia's dissent is all about criticizing the majority for its "penchant for eschewing clear rules that might avoid litigation"[105] in favor of a rule that Justice Scalia says he simply cannot understand.[106] The Breyer - Scalia disagreement was the subject of an interesting recent article by Linda Greenhouse, the NY Times Supreme Court correspondent, where she described the philosophical divide between Scalia and Breyer as one between text and context and between bright line rules and flexible standards.[107] Whether interpreting the Constitution or a statute, Justice Scalia begins and ends with the text,[108] whereas Justice Breyer believes "a law's purpose and a decision's likely consequence are the more important elements."[109] So, in public lectures delivered this past year Justice Scalia declared "[t]he

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[100] *Barnett*, 535 U.S. at 393-94; *id* at 408, (O'Connor, J., concurring).
[101] *Id.* at 411 (Scalia, J., dissenting).
[102] *Id.* at 420 (Souter, J., dissenting).
[103] *Id.* at 413-14 (Scalia, J., dissenting).
[104] *Id.* at 420 (Souter, J., dissenting).
[105] *Barnett,* 535 U.S. at 412 (Scalia, J., dissenting).
[106] *Id.* at 418-19.
[107] Linda Greenhouse, *The Nation: Judicial Intent, The Competing Visions of the Role of the Court,* N.Y. TIMES, July 7, 2002, Section 4, at 3.
[108] *Id.*
[109] *Id.*

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Constitution that I interpret and apply is not living, but dead,"[110] whereas Justice Breyer advocated a dynamic, non-static method of interpretation.[111]

Barnes v. Gorman[112]

The fourth ADA case of the term differs from the others in that it is not an employment discrimination case but one that arises under Title II of the ADA which prohibits discrimination against the disabled in public services.[113] The issue in *Barnes v. Gorman* was whether punitive damages could be recovered in a private cause of action brought under Title II.[114] Utilizing somewhat convoluted reasoning, the Court concluded that punitive damages were not available.[115]

The case was commenced by a paraplegic who was arrested and transported to the station house in a van not equipped to accommodate a wheelchair.[116] He was belted to a bench in the van, however, the belts became undone and as a result he fell to the floor and suffered serious injuries.[117] In a suit under the ADA and under the Rehabilitation Act,[118] petitioner was awarded $1 million in compensatory damages and $1.2 million in punitive damages.[119] The district court set aside the punitive damage award saying it was unavailable in suits under both the ADA and the Rehabilitation Act.[120] The Eighth Circuit reversed, finding that absent congressional intent to the contrary, the federal courts have the power to award appropriate relief, and punitive damages are

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[110] *Id.*
[111] *Id.*
[112] 536 U.S. 181 (2002).
[113] 42 U.S.C. § 12132 (Section 202 of the ADA prohibits discrimination against the disabled by public entities and is enforceable through private causes of action).
[114] *Barnes*, 536 U.S. at 183.
[115] *Id.* at 189.
[116] *Id.* at 183.
[117] *Id.*
[118] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (29 U.S.C. §§ 701-794).
[119] *Barnes*, 536 U.S. at 184.
[120] *Id.*

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"an integral part of the common law tradition and the judicial arsenal."[121] The Supreme Court disagreed.[122]

While the ADA's prohibition of discrimination against the disabled by public entities is enforceable in a private cause of action, Section 203 of the ADA provides that the "remedies, procedures and rights" provided in the Rehabilitation Act govern.[123] The Rehabilitation Act in turn refers to the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964.[124] You now see why I referred to the reasoning as convoluted. It gets worse. Title VI was enacted pursuant to Congress' spending power,[125] which is in the nature of a contract – in return for federal funds, the recipient agrees to comply with federally imposed conditions.[126] So just as a contract requires offer and acceptance of its terms, the legitimacy of what Congress does under the spending power rests on whether the recipient voluntarily and knowingly accepted the terms of the grant of federal money.[127] Employing this contract law analogy, the Court concluded that Title VI funding recipients have not, merely by accepting funds, impliedly consented to liability for punitive damages.[128] Since punitive damages cannot be awarded in private suits brought under Title VI, they cannot be awarded under the Rehabilitation Act, and consequently, they cannot be awarded under Title II of the ADA.

Although no justice dissented from the conclusion, there is disagreement about the Court's reasoning. Why should the Court rely on an analogy to contract law when the ADA was not enacted pursuant to the spending clause, particularly when two alternative

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[121] *Id.* (quoting Gorman v. Easley, 257 F.3d 738, 745 (2001)).

[122] *Id.* at 189.

[123] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at scattered sections of 29 U.S.C.).

[124] Civil Rights Act of 1964 Pub. L. No. 88-352, 78 Stat. 241 (codified at scattered sections of 42 U.S.C.).

[125] *Barnes*, 536 U.S. at 185-86; *see* U.S. CONST. art. I, § 8.

[126] *Id.* (quoting Pennhurst State Sch. & Hosp.v. Halderman, 451 U.S. 1, 17 (1981)).

[127] *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

[128] *Id.* at 188 (noting that community standards of fairness support the Court's decision because to award punitive damages for violations of Title VI would create unusual and disproportionate exposure to liability by all recipients accepting federal funding under the Act).

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grounds existed for the decision:[129] first that municipalities are not subject to punitive damage awards;[130] and second that Congress did not intend to authorize a punitive damage remedy for violations of Title II of the ADA.[131]

EEOC v. Waffle House[132]

This case is the latest in a series of cases assessing the effectiveness of arbitration clauses in employment discrimination cases, and it is the single victory for ADA plaintiffs from last year's Supreme Court docket. While this case arose in the context of the ADA, it is important to note that the decision extends to all employment discrimination cases.[133] Last year, we discussed *Circuit City v. Adams,*[134] where the Court held that employees who sign employment contracts containing arbitration clauses are bound by the arbitration clause.[135] These clauses were found not to be within the statutory exemption of the Federal Arbitration Act (FAA).[136] One issue left unresolved by *Circuit City* was the scope of the EEOC's power to pursue claims on behalf of discrimination claimants who would themselves be precluded from seeking judicial relief by virtue of a binding arbitration agreement. Some circuits had held that the EEOC has the authority to sue employers for back pay, reinstatement and damages on behalf of discrimination claimants, whereas other circuits had held that the EEOC could not seek victim specific relief.[137]

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[129] *Id.* at 191 (Stevens, J., concurring) (explaining Title II of the ADA was not enacted pursuant to Congress' spending power).

[130] *Barnes*, 536 U.S. at 191.

[131] *Id.*

[132] EEOC v. Waffle House, 534 U.S. 279 (2002).

[133] *Id.*

[134] 532 U.S. 105 (2001).

[135] *Id.*

[136] Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-15 (2000)). On May 1, 2002, Senator Edward M. Kennedy, a Massachusetts Democrat, introduced the Preservation of Civil Rights Protections Act of 2002 that would effectively undo this result. *See* S. 2435, 107th Cong. (2002). This bill seeks to amend the Federal Arbitration Act to exclude all employment contracts from arbitration.

[137] *Waffle House*, 534 U.S. at 285.

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In *Waffle House*, Eric Baker was hired as a minimum wage cook and required to sign an arbitration agreement.[138] Sixteen days after he started working, he suffered a seizure and was discharged.[139] Baker filed a charge of discrimination with the EEOC alleging that his discharge violated the ADA.[140] After investigating, the EEOC filed an enforcement action against Waffle House, in which the EEOC sought injunctive relief, back pay, reinstatement, and compensatory and punitive damages.[141] The Court of Appeals held that when an employee has signed a mandatory arbitration agreement, the EEOC is precluded from seeking victim specific relief and the only remedy available in an enforcement action is injunctive relief.[142]

The Supreme Court, with Justice Stevens writing for a six to three majority, reversed, holding that the EEOC may seek victim specific relief.[143] The ADA provides that the EEOC has the same enforcement powers with respect to the ADA as it has under Title VII.[144] Thus, the opinion is based on an analysis of Title VII, which, according to the Court, unambiguously authorizes the EEOC to bring an enforcement action in which it seeks to enjoin the employer from engaging in unlawful employment practices, and to pursue reinstatement, back pay and compensatory or punitive damages.[145] The Court found that the FAA, which was enacted to reverse the longstanding judicial hostility to arbitration agreements,[146] in no way changes this result. It merely directs courts to place arbitration agreements on equal footing with other contracts but it certainly does not require parties (such as the EEOC) to arbitrate when they have not agreed to do so.[147] Since arbitration under the FAA is a matter of consent, not coercion, and

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[138] *Id.* at 282-83.
[139] *Id.* at 283.
[140] *Id.*
[141] *Id.*
[142] *Waffle House*, 534 U.S. at 283.
[143] *Id.*
[144] *Id.* at 283; 42 U.S.C. § 12117(a) (2000).
[145] *Id.* at 283.
[146] *Id.* at 289 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).
[147] *Waffle House*, 534 U.S. at 293.

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since the EEOC was not a party to the contract containing the arbitration clause, the contract cannot bind the EEOC.[148]

Left unresolved by the decision is the effect of a settlement or arbitrated judgment on the relief that the EEOC seeks. Certainly, if the claimant failed to mitigate his or her damages or accepted a monetary settlement, any recovery sought by the EEOC would be limited accordingly.[149] Could the Court stop an ongoing arbitration while the EEOC prosecuted its enforcement claim? The governing principle would be that any double recovery would of course be precluded.[150]

Justice Thomas authors a dissent, joined by Chief Justice Rehnquist and Justice Scalia.[151] The ex-chairman of the EEOC reads the statute and legislative history of Title VII quite differently from the majority, concluding that an authorization to seek relief is different from an authorization to obtain relief. Thomas argues that the statute only authorizes the award of appropriate relief and victim specific relief is not appropriate, and in any event, the Court's holding undermines the liberal federal policy favoring arbitration agreements.[152]

What is the practical significance of this decision? On the one hand, one could speculate, as the majority did,[153] that since the EEOC files suit in such a small fraction of cases, this decision has little import. In a footnote, the Court notes "it is worth recognizing that the EEOC files suit in less than one percent of the charges filed each year."[154] In fiscal year 2000, for example, the EEOC received almost 80,000 charges of employment discrimination, found reasonable cause in more than 8000, but only filed 291 lawsuits and intervened in 111 others.[155] There is, however, another way of looking at this. Given the fact that approximately six million employees are covered by arbitration agreements,[156] many of whom are low wage workers who cannot afford private

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[148] *Id.* at 284.
[149] *Id.* at 296.
[150] *Id.* at 297.
[151] *Id.* at 298 (Thomas, J., dissenting).
[152] *Waffle House*, 534 U.S. at 308 (Thomas, J., dissenting).
[153] *Id.* at 290 n.7.
[154] *Id.*
[155] *Id.*
[156] *Id.*

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arbitration, and that the number of employees covered by arbitration agreements is growing rapidly, the role of the EEOC acquires far greater significance. An amicus brief filed for the Council for Employment Law Equity made the point that given the prevalence of arbitration agreements, it is particularly important that the agency has the ability to bring to the court system certain precedent-setting cases as a super-police officer over the arbitration process.[157] Over the past ten years, the EEOC has filed more than 3000 suits against employers recovering more than $500,000,000 in damages.[158] When viewed in that light, EEOC Chairman Cari Dominguez may be right when she said the ruling "reaffirms the significance of the EEOC's public enforcement role."[159]

The other consequence of this decision is the one emphasized in an amicus brief filed on behalf of the EEOC by the Attorneys General of twenty-eight states who feared that a ruling against the EEOC would compromise their ability to bring consumer protection cases where the consumer has signed a purchase or credit agreement containing an arbitration clause.[160]

The Court also decided two non-ADA cases and ruled in favor of the plaintiffs in both.[161] They are both procedural in nature, one raising a pleading question, and the other a statute of limitations question. They are both important cases but we can review them rather quickly.

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[157] *See generally,* Brief of Amici Curiae Council for Employment Law Equity, EEOC v. Waffle House, 534 U.S. 279 (2002) (No. 99-1823).

[158] *See* http://www.eeoc.gov/stats/litigation.html (last visited April 29, 2003).

[159] Joan Biskupic, *Supreme Court Ruling Defends Power of EEOC,* USA. TODAY, Jan. 16, 2002, at B2 (quoting Cari Dominguez).

[160] Brief of Amici Curiae at 4, EEOC v. Waffle House, 534 U.S. 279 (2002) (No. 99-1823).

[161] Swierkiewicz v. Sorema, 534 U.S. 506, (2002); Nat'l. R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

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Swierkiewicz v. Sorema[162]

Swierkiewicz raises the question of what an employment discrimination plaintiff has to allege in his or her complaint in order to withstand a motion to dismiss.[163] As all employment discrimination practitioners know, the blueprint for establishing a case of employment discrimination based on circumstantial evidence was set forth by the Supreme Court many years ago in *McDonnell Douglas, Corp. v. Green*.[164] In order to make out a *prima facie* case of employment discrimination pursuant to the *McDonnell Douglas* methodology, plaintiff must prove four things: 1) that plaintiff is a member of a protected category, 2) that plaintiff was qualified for the job or promotion she sought, 3) that she was denied the job or promotion, and 4) that the denial occurred under circumstances that support an inference of discrimination which typically, although not always, is done by showing that the employer offered the position to someone outside the protected category.[165] Once the plaintiff establishes this four-part test, the defendant has the opportunity to show a non-discriminatory reason for the decision, at which point the plaintiff must show that the employer's proffered reason is merely a pretext for discrimination.[166]

In *Swierkiewicz*, plaintiff's claims of discrimination based on national origin and age were dismissed pursuant to the Second Circuit's heightened pleading rule that requires a plaintiff in an employment discrimination complaint to allege facts constituting a *prima facie* case of discrimination under *McDonnell Douglas*.[167] Other circuits do not impose this pleading requirement.[168] Interestingly, the Bush administration sided with the plaintiff in

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[162] 534 U.S. 506 (2002).
[163] *Id.* at 508.
[164] 411 U.S. 792 (1973).
[165] *Swierkiewicz*, 534 U.S. at 510 (citing McDonnell Douglas, Corp. v. Green, 411 U.S. 792, 802 (1973)).
[166] *McDonnell Douglas*, 411 U.S. at 802.
[167] *Swierkiewicz*, 534 U.S. at 509.
[168] *Id.* at 509-10.

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this case, and the Solicitor General filed a brief arguing against the Second Circuit rule.[169]

In a short unanimous decision by Justice Thomas, the Court held that the four-part *prima facie* case established by *McDonnell Douglas* is an evidentiary standard, not a pleading requirement.[170] Imposing a heightened pleading rule would convert the *McDonnell Douglas* formula from a flexible test into a rigid mechanized one and would conflict with Federal Rule of Civil Procedure 8(a) which provides for simplified pleading standards rather than technical rules of pleading.[171]

The consequence of this decision is certainly significant here in the Second Circuit. It will permit virtually all employment discrimination complaints to proceed at least through discovery, which is often tremendously important in these cases as it is the only way for plaintiffs to get at the information they need regarding the defendant's records of hiring and promotion decisions.

National Railroad Passenger Corporation v. Morgan[172]

Morgan raises the issue of whether employment discrimination claimants may recover for discriminatory acts occurring outside the 180 or 300 day limitation period for filing claims with the EEOC.[173]

Abner Morgan worked for Amtrak and claimed he was harassed and disciplined more harshly than other employees solely because of his race.[174] He filed a charge of discrimination with the EEOC complaining of acts occurring within 300 days of the filing, but also of acts occurring outside that time period.[175] The statute requires that a charge be filed within either 180 or 300 days after

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[169] Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae supporting petitioner, at 11-12, Swierkiewicz v. Sorema, 534 U.S. 506 (No. 00-1853).

[170] *Swierkiewicz*, 534 U.S. at 510.

[171] *Id.* at 512.

[172] 536 U.S. 101 (2002).

[173] *Id.* at 104-05.

[174] *Id.* at 105.

[175] *Id.* at 106.

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the alleged unlawful employment practice occurred.[176] The circuit courts have employed different rules for dealing with this problem. Some circuits have found the earlier conduct actionable under a continuing violation theory.[177] Others use a multi-factor approach which takes into account whether the untimely acts involve the same type of discrimination; whether the incidents are recurring or independent isolated acts; and whether the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the conduct.[178]

The Supreme Court, with Justice Thomas somewhat surprisingly siding with, and writing for, the four "liberal" members of the Court, distinguished discrete discriminatory acts from acts giving rise to hostile environment claims.[179] Discrete discriminatory acts occur on the day that they happen, which is when the time limitation period begins to run.[180] Thus, discrete discriminatory acts are not actionable if time barred and that does not change even when those acts are related to acts which were timely.[181] Each discrete discriminatory act starts the clock running anew.[182] If any prior untimely acts exist they may be used by the plaintiff as background evidence in support of a timely claim, however these acts are not themselves actionable.[183] Termination, failure to promote, denial of transfer or refusal to hire are all examples of discrete acts.[184] Such discrete acts are not actionable

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[176] *Id.* This 180 or 300 day requirement is contingent upon whether or not a particular state has its own human rights agency for handling such complaints. *Id.*

[177] *Morgan*, 536 U.S. at 106-07.

[178] *Id.* at 107 n.3.

[179] *Id.*

[180] *Id.* at 110 (stating that "[a] party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it").

[181] *Id.* at 113.

[182] *Morgan*, 536 U.S. at 113 ("The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.").

[183] *Id.*

[184] *Id.* at 114.

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on the theory that they are part of a continuing violation.[185] Rather, they are separate actionable unlawful discriminatory practices.[186]

In contrast are acts giving rise to hostile environment claims.[187] Hostile environment claims arise when the workplace is permeated with "discriminatory intimidation, ridicule and insult"[188] that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.[189] In contrast to discrete acts of discrimination, a hostile environment claim typically may not be predicated on a single act of harassment.[190] Hostile environment claims by their very nature involve repeated conduct and thus cannot be said to have occurred on a particular day.[191] Since the timely filing rule requires the filing of a claim within 180 or 300 days "after the alleged unlawful employment practice occurred" and since a hostile work environment claim is necessarily comprised of a series of acts that collectively constitute an unlawful employment practice, it does not matter that some of the acts occurred outside the statutory time period so long as an act contributing to that claim occurs within the filing period.[192] The Court rejects the rule employed by some circuits that permits a consideration of earlier acts only when it would be unreasonable to expect the plaintiff to sue before the statute ran on that conduct.[193] Thus the plaintiff friendly rule that the Court announces is that in order to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the same hostile work environment claim.[194] This is a plaintiff friendly rule because under this decision the period covered may extend well beyond the

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[185] *Id.*
[186] *Id.* at 114-15.
[187] *Morgan,* 536 U.S. at 115.
[188] *Id.* at 116 (quoting Harris v. Forklift Sys. 510 U.S. 17 (1993); Meritor Sav. Bank, FSB v. Visnon, 477 U.S. 57, 65 (1986)).
[189] *Id.* (quoting *Harris*, 510 U.S. at 21; *Vinson*, 477 U.S. at 67).
[190] *Id.* at 115.
[191] *Id.*
[192] *Morgan*, 536 U.S. at 117.
[193] *Id.* at 117 n.11.
[194] *Id.* at 118.

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300 days – in fact the decision makes clear that it may extend for a number of years.[195]

What about employers who are prejudiced by unreasonable delays in filing charges? Justice Thomas suggests that such employers are not without recourse.[196] Courts may rely on equitable doctrines such as waiver, estoppel, laches and equitable tolling to protect such employers from unreasonable and prejudicial delay.[197]

As I indicated earlier, this is a very significant case because it removes what had been a real problem facing sexual and racial harassment plaintiffs in several circuits that had imposed much stricter rules regarding these time limits.

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[195] *Id.* at 118-19.
[196] *Id.* at 121.
[197] *Morgan*, 536 U.S. at 121-22.

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