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Discrimination Cases in the October 2004 Term

Eileen Kaufman
Touro Law Center, ekaufman@tourolaw.edu

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DISCRIMINATION CASES IN THE OCTOBER 2004 TERM

Eileen Kaufman[*]

The discrimination cases before the Supreme Court last Term covered a wide array of protected categories, including disability, age, sex, and race, and arose in a broad range of contexts, including cruise ships, municipal employment, public schools, and prisons.[1] Each case raised an issue of profound importance that had produced conflicts in the circuits: whether the cruise industry must conform to U.S. nondiscrimination rules when docked at American ports and operating in American harbors;[2] whether employers are subject to age discrimination claims when they adopt practices that fall disproportionately harshly on older workers;[3] whether schools can retaliate against whistleblowers who complain about sex discrimination; and whether prisons can racially segregate prisoners

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[*] Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Skidmore College, 1970; J.D., New York University, 1975; LL.M., New York University 1992. Prior to serving as Professor of Law at Touro Law Center, Professor Kaufman was a Managing Attorney at Westchester Legal Services, Inc. Professor Kaufman is the co-President of the Society of American Law Teachers and serves as Reporter for the New York Pattern Jury Instructions. She has published primarily in the area of civil rights and women's rights.

[1] *See* Spector v. Norwegian Cruise Line, 125 S. Ct. 2169 (2005); Smith v. City of Jackson, 544 U.S. 228, 125 S. Ct. 1536 (2005); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 125 S. Ct. 1497 (2005); Johnson v. California, 125 S. Ct. 1141 (2005); *see also* Martin A. Schwartz, *Section 1983 Cases In the Supreme Court's 2004 Term*, 21 TOURO L. REV. 763 (2006) for a discussion of the Supreme Court's decision in *Johnson*.

[2] *Spector*, 125 S. Ct. at 2174.

[3] *Smith*, 125 S. Ct. at 1536.

for the first sixty days of their confinement.[4] In each case, the plaintiff prevailed in the Supreme Court, although sometimes achieving less than full relief.[5]

I. DISABILITY: SPECTOR V. NORWEGIAN CRUISE LINE, LTD.[6]

The Americans with Disabilities Act ("ADA") has presented myriad questions for the Court over the past few years.[7] The issue in *Spector* was whether Title III of the Act, which prohibits discrimination in places of public accommodation and in public

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[4] *Jackson*, 125 S. Ct. at 1502-03; *Johnson*, 125 S. Ct. 1141.

[5] *See Spector*, 125 S. Ct. at 2184 (holding that Title III applies to foreign ships that are in United States waters however noting that this holding triggers the application of the "clear statement rule" which the court on remand will use to evaluate whether "Title III nonetheless imposes certain requirements that would interfere with the internal affairs of foreign ships"); *Smith*, 125 S. Ct. at 1545-46 (establishing that although the disparate impact theory is available as a viable claim under the Age Discrimination in Employment Act of 1967, petitioners did not sufficiently show the particular employment practice created disparities); *Jackson*, 125 S. Ct. at 1509-10 (finding that Title IX of the Education Amendments of 1972 provided for a right of action for retaliation but also expressing that "At this stage of the proceedings, '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' " (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974))); *Johnson*, 543 U.S. at 515 (concluding that a policy implemented by a prison whereby prisoners were segregated on the basis of race was subject to strict scrutiny review while clearly not ruling on whether the policy was, in fact, an Equal Protection violation).

[6] *Spector*, 125 S. Ct. at 2169.

[7] The Court has held that: professional golf tournaments are covered by Title III, PGA Tour v. Martin, 532 U.S. 661 (2001); impairments that are correctible are not covered disabilities, Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999), nor is carpal tunnel syndrome, Toyota v. Williams, 534 U.S. 184 (2002), but asymptomatic HIV is, Bragdon v. Abbot, 524 U.S. 624 (1998); municipalities are not subject to punitive damages in private ADA suits, Barnes v. Gorman, 536 U.S. 181 (2002); an employer can refuse to hire a disabled person where the postion poses risk to the employee's own health, Chevron v. Echazabal, 536 U.S. 73 (2002); and the ADA's requirements are trumped by a seniority plan, U.S. Airways v. Barnett, 535 U.S. 391 (2002). Most notable are the cases questioning whether Congress, in passing the ADA, had the constitutional authority to subject the states to suit. The Court has ruled that Congress lacked the power to abrogate the states' sovereign immunity for claims of discrimination by disabled workers, University of Alabama v. Garrett, 531 U.S. 356 (2001), but it did have the power to subject the states to suit for failure to provide access to courthouses, Tennessee v. Lane, 541 U.S. 509 (2004). In *United States v. Georgia*, 126 S. Ct. 877 (2006), the Court recently held that Congress had the power to subject the states to suit for claims for money

transportation services, applies to foreign flag cruise ships operating in U.S. waters.[8] Virtually all cruise ships fly under foreign flags, so this question affects the entire cruise industry. While at first blush this may seem like a narrow issue, it raises broad questions about the potential reach of U.S. law, an issue of increasing practical and symbolic importance these days. At oral argument, Justice Ginsburg characterized the plaintiff's position as "The U.S. rules the world. No matter what the other ports say, U.S. law is going to govern."[9] Justice Souter rephrased the characterization as "U.S. law rules the world unless the world doesn't want to use the U.S. as a port of call."[10]

The oral argument was also punctuated by questions about how a ruling in this case would affect the application of other civil rights statutes.[11] Could a cruise ship putting in at a New York harbor freely discriminate among passengers on the basis of race?[12] Whose rules govern, the law of the flag of the ship, out of respect for the sovereignty of other countries, or the "peace of the port," because a ship entering our waters should comply with domestic obligations imposed to protect our citizens.[13] The circuits were split on this

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damages asserted by prisoners, at least where the claims involve constitutional violations.

[8] *Id.* at 2174.

[9] Transcript of Oral Argument at 9, *Spector*, 125 S. Ct. 2169 (2005).

[10] Transcript of Oral Argument at 17.

[11] *Id.* at 28, 32, 33.

[12] *Id.* at 33. Justice Ginsburg indicated at oral argument that accepting the defendant's argument would mean that the public accommodations provision of the Civil Rights Act of 1964 would be inapplicable to foreign ships. Linda Greenhouse, *Disabled Cruise Passengers Ask for Justices' Protection*, NEW YORK TIMES, March 1, 2005.

[13] *Spector*, 125 S. Ct. at 2178 (analyzing Congress's intent behind statutory instruction) (noting that it is reasonable to presume that while Congress did not intend on interfering with foreign cruise ships, it is also a reasonable presumption that Congress had the interests of American citizens in mind in the statutes' creation).

issue,[14] with the Fifth Circuit, which encompasses ports in Louisiana and Texas, finding that that the ADA does not apply to foreign flagships,[15] and the Eleventh Circuit, which encompasses Florida's ports, finding that the ADA does apply.[16] The Justice Department in *Spector* weighed in on the side of the plaintiffs.[17]

We do not know too much factually about the nature of the discrimination because the case was dismissed before trial.[18] We do know that the plaintiffs claimed that they were charged a premium for accessible but inferior staterooms,[19] and that various facilities on the ship were not accessible, including the public bathrooms, the swimming pool, and the jacuzzis.[20] The complaint alleged that Norwegian Cruise Lines failed to comply with the obligations imposed by the ADA requiring reasonable modifications in policies, practices, and procedures to accommodate disabled passengers as well as the requirement to remove architectural barriers that are structural in nature, where such removal is readily achievable.[21]

The basic question for the Court was whether foreign flag

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[14] *Compare* Spector v. Norwegian Cruise Line, 356 F.3d 641 (5th Cir. 2004), *rev'd*, 125 S. Ct. 2169 (2005) *with* Stevens v. Premier Cruises, Inc., 215 F.3d 1237,1243 (11th Cir. 2000) (holding that Title III of the ADA applied to foreign-flagged cruise ships that were in United States waters).

[15] *Spector*, 125 S. Ct. at 2178 (referring to the holding of the Fifth Circuit that Title III is not applicable "to foreign-flag cruise ships in United States waters").

[16] *Id.* at 2174 (citing *Stevens*, 215 F.3d 1237).

[17] *Id.* at 2177, 2183-84 (invalidating the holding of the Fifth Circuit finding that Title III of the ADA applies to foreign ships while the ships are in the waters of the United States).

[18] *Id.* at 2176 (noting that the action was dismissed pursuant to "FED. RULE CIV. PROC. 12(b)(6), before extensive discovery").

[19] *Id.* at 2179.

[20] *See Spector*, 125 S. Ct. at 2179.

[21] *Id.* at 2179-80.

cruise ships are covered by the Act.[22] While the question seems simple—cruise ships easily fall within the statutory definitions of public accommodations and public transportation services[23] –what complicates this otherwise straightforward question is the so-called "clear statement rule." Previous Supreme Court decisions had established the principle that Congress must clearly signify its intent before a statutory requirement can interfere with the internal affairs and operations of foreign flagships.[24] The ADA contains no such clear statement.[25] The question in *Spector* thus becomes whether the requirements imposed by the ADA do, in fact, interfere with the internal order and discipline of the ship rather than the so-called peace of the port.[26]

In order to answer that question, the Court in *Spector* first had to ascertain what constitutes internal affairs or internal orders.[27] The Court stated "The precise content of the category is difficult to define with precision."[28] The Court also acknowledged that its previous decisions were ambiguous as to whether or not the clear statement rule applied to "matters that affect only the internal order of the ship when there is no affect on United States interests, or whether the

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[22] *Id.* at 2174.

[23] *Id.* at 2177 (recognizing that although not explicit in the statute, cruise ships fall within the definitions of " 'public accommodations' and 'specified public transportation' ").

[24] *Id.* (explaining that the Court has held that certain, general statutes will not apply to the internal affairs of foreign ships that are docked in United States waters without a clear statement expressing that the foreign ships' affairs were meant to fall within the statutes (citing Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963))).

[25] *Spector*, 125 S. Ct. at 2177.

[26] *Id.* at 2179.

[27] *See id.* (discussing the difficulty in defining "internal affairs").

[28] *Id.*

clear statement rule further comes into play if the predominant effect" is on a foreign ship's internal affairs but the requirement also affects United States interests.[29]

Having raised the question, the Court declined to answer it, instead concluding that some of the plaintiffs' allegations clearly have nothing to do with the internal affairs of the vessel:[30] allegations such as charging disabled passengers higher fares and surcharges, requiring disabled passengers to waive potential medical liability and to travel with a companion, and reserving the right to discharge disabled passengers whose presence discomforts other passengers.[31]

However, other allegations might be construed as relating to the internal affairs of the ship—those allegations having to do with physical barriers to access, for example, the raised edges around the doorways allegedly made certain areas inaccessible to passengers in wheelchairs, and the ship's most attractive cabins in the most desireable locations were inaccessible to disabled passengers.[32] If the ADA were read to require permanent and significant structural modifications, those requirements would certainly interfere with the internal affairs of the ship and the clear statement rule would come

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[29] *Id.*

[30] *Spector,* 125 S. Ct. at 2179. The Court stated, "it suffices to observe that the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquility of the port." *Id.*

[31] *See id.*

[32] *Id.* ("The statutory requirement could mandate a permanent and significant alteration of a physical feature of the ship . . . these applications of the barrier removal requirement likely would interfere with the internal affairs of foreign ships.").

into play, meaning the ADA would not apply.[33]

The Court concluded that it was unnecessary to resort to the clear statement rule because Title III requires barrier removal only if it is readily achievable[34] and structural modifications of a ship are unlikely to be readily achievable for two reasons: they could conflict with international legal obligations and they could pose a threat to the safety of others.[35] Thus, the Court concluded that under a proper interpretation of the readily achievable language in the ADA, Title III would impose no requirements that interfere with the internal affairs of foreign flag cruise ships.[36]

Chief Justice Rehnquist, and Justices Scalia and O'Connor dissented from the basic proposition that Title III covers cruise ships and criticized the plurality's adoption of a case-by-case approach.[37] Under the plurality's approach, every time a disabled passenger seeks redress against a foreign flag ship, the Court would need to decide whether the particular remedy sought implicates the internal order of the ship.[38] Instead, the dissenting Justices would utilize an all or nothing approach and decline to apply all of Title III to foreign flagships absent a clear statement from Congress.[39]

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[33] *Id.* at 2181 (explaining that in situations where the question is unclear as to whether the requirement is readily achievable but the requirement would effect the internal affairs of the foreign ship due to structural modifications, the clear statement rule may be applied and there is no need to determine Title III applicability).

[34] *Id.* at 2177. The ADA defines readily achievable as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (2006).

[35] *Spector*, 125 S. Ct. at 2180.

[36] *Id.* at 2181.

[37] *Spector*, 125 S. Ct. 2188 (Scalia, J., dissenting).

[38] *Id.* at 2184.

[39] *Id.* at 2191 ("[B]ecause Title III's barrier-removal provisions clearly have the possibility of subjecting foreign-flag ships to conflicting international obligations, no reading

The bottom line in *Spector* is that Title III applies to foreign flag cruise ships in U.S. waters in much the same way as it applies to American ships in those waters.[40] After *Spector*, claims by disabled passengers that would require permanent and significant structural modifications to the ship are unlikely to be successful, not because of the clear statement rule, and not because of the foreign flag, but because the ADA does not require structural modifications that are not readily achievable.[41]

As a practical matter, market forces may have already mooted the question. Increasingly, cruise ships are being outfitted to accommodate disabled passengers who are a significant part of the market.

II. AGE: SMITH V. CITY OF JACKSON, MISSISSIPPI[42]

The second discrimination case of the Term was *Smith v. City of Jackson, Mississippi*, which dealt with the Age Discrimination in Employment Act ("ADEA"). Specifically, *Smith* focused on the disparate impact theory of discrimination.[43] Under disparate impact theory, a plaintiff asserts a claim that a policy, neutral on its face, is nevertheless discriminatory because it has a disproportionate impact on a protected group.[44] The disparate impact theory has proved crucial in achieving the purposes of civil rights laws because

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of Title III—no matter how creative—can alter the presumption that Title III does not apply to foreign-flag ships without a clear statement from Congress.").

[40] *Id.* at 2178 (plurality opinion).

[41] *Spector*, 125 S. Ct. at 2177.

[42] 125 S. Ct. 1536 (2005).

[43] *Id.* at 1539.

[44] Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

requiring proof of intentional discrimination is virtually impossible in the modern era.[45] It is the rare employer who would explicitly base an adverse employment decision on a discriminatory reason.[46] Disparate impact theory obviates the need to find the proverbial smoking gun, by focusing on the effects of an employment practice rather than on its motivation[47]

The question of whether the ADEA requires proof of intentional discrimination has been one of the most important open questions of any of the civil rights statutes. Some circuits have permitted disparate impact claims, while other have required proof of intentional discrimination.[48] This is an issue of enormous consequence given that by the year 2010, more than half the labor force will be over forty years of age.

In *Smith*, by a five-to-three decision, the Court held that the ADEA does not require proof of intentional discrimination.[49] In other words, a plaintiff can prevail by showing that an employer's policy had a disparate impact on older workers.[50] Nevertheless, the Court denied relief to the plaintiffs in this case, finding that the

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[45] Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 148 (2000),

[46] *See* Enlow v. Salem-Keizer Yellow Cab Co. Inc., 371 F.3d 645, 653-54 (9th Cir. 2004) (holding that employer was justified in decision to temporarily terminate employee based on age to prevent loss of insurance coverage).

[47] *Raytheon*, 540 U.S. at 50.

[48] *See* Wado v. Xerox Corp., 991 F. Supp. 174, 183 (2d Cir. 1998) (recognizing disparate impact claims under the ADEA); Parks v. Pomeroy, 387 F.3d 949 (8th Cir. 2004); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1293 n.7 (9th Cir. 2000). *But see* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996) (refusing disparate impact claim under ADEA); Mullin v. Raytheon Co., 164 F.3d 696, 703-04 (1st Cir. 1999). Johnson v. Bd. of Regents, 263 F.3d 1234 (7th Cir. 2001); Dunn v. Wash. County Hosp., 429 F.3d 689 (11th Cir. 2005).

[49] *Smith*, 125 S. Ct. at 1541.

[50] *Id.* at 1542.

employer's rationale for the challenged policy was unquestionably reasonable.[51]

The plaintiffs in *Smith* were police officers who challenged the city's adoption of a pay plan that gave proportionately higher raises to officers who had been on the job for less than five years than to officers with more seniority.[52] Plaintiffs argued that this policy had a disparate impact on older workers and was therefore unlawful under the ADEA.[53] The lower courts dismissed the claim, finding that disparate impact claims are categorically unavailable under the statute.[54] The Supreme Court disagreed, holding that the ADEA does encompass disparate impact claims.[55] The Court relied on several sources. First, the Court looked to the language of the statute, which parallels Title VII. Second, the Court looked to the fact that the EEOC has consistently interpreted the Act to cover disparate impact. Finally, the Court looked to its 1971 decision in *Griggs v. Duke Power Company*, where the Court established the principle that Title VII encompasses disparate impact.[56]

In *Griggs*, the Court prohibited an employer from requiring a high school education or a passing score on a standardized intelligence test as a condition of employment when neither requirement was related to job performance and the requirement had

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[51] *Id.* at 1545.
[52] *Id.* at 1539.
[53] *Id.*
[54] *Smith*, 125 S. Ct. at 1539-40.
[55] *Id.* at 1540.
[56] *Id.* at 1541 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that Title VII does not require a showing of disparate impact)).

a disproportionate effect on black applicants.[57] The *Griggs* Court stated that, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for minority groups and are unrelated to measuring job capability."[58] Since *Griggs* interpreted text that is virtually identical to the ADEA, it supports the conclusion that disparate impact theory should be congizable under the ADEA.[59]

However, there is a huge qualification to the holding in *Smith*. Unlike Title VII, the ADEA contains a provision that permits otherwise prohibited action where the differentiation is based on reasonable factors other than age.[60] The Court referred to this provision as the RFOA provision.[61]

The RFOA provision precludes liability in disparate impact cases if the adverse impact was attributable to a non-age factor that was reasonable.[62] Therefore, the scope of disparate impact liability under the ADEA is considerably narrower than under Title VII.[63] That point is reinforced by the Court's holding that disparate impact claims under the ADEA are governed by the limiting principles

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[57] *Griggs*, 401 U.S. at 425-26, 431, 436.

[58] *Id.* at 432.

[59] *Smith*, 125 S. Ct. at 1541.

[60] *Id.* at 1543 ("The RFOA provision provides that it shall not be unlawful for an employer 'to take any action otherwise prohibited under subsection (a) where the differentiation is based on reasonable factors other than age discrimination.' ").

[61] *Id.*

[62] *Id.* at 1544.

[63] *Id.* ("Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate impact liability under ADEA is narrower than under Title VII."). The Court notes that Congress' decision to treat age discrimination claims differently that other forms of discrimination makes sense because age, unlike race or sex, is more likely to be relevant to a worker's capacity to engage in certain types of employment. *Id.*

articulated in its 1989 decision in *Wards Cove Packing Inc. v. Atonio,*[64] a case legislatively overruled by the Civil Rights Act of 1991, but still, we are told, applicable to age discrimination claims.[65] *Wards Cove* requires that plaintiffs do more than point to a generalized employment practice that disproportionately impacts older workers. Rather, plaintiffs must isolate the specific practice and demonstrate through statistical evidence a causal connection between that specific practice and a disproportionate result.[66]

How do the police officers of Jackson, Mississippi fare? They lose.[67] The Court reasoned that the employer's pay plan was easily justified on the basis of a reasonable factor other than age,[68] that the purpose of the plan was to be competitive in the job market.[69] Paying new officers more was a way of retaining candidates by bringing salaries in line with that of surrounding police forces.[70] While there were other ways of accomplishing the goal of being competitive in the market, the ADEA, unlike Title VII, does not require that the practice be justified by business necessity.[71] Rather, the ADEA merely requires that the approach the employer selected

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[64] 490 U.S. 642 (1989).

[65] *Smith*, 125 S. Ct. at 1545 (2005) (holding that the Civil Rights Act of 1991 expanded the coverage of Title VII, but did not overturn *Wards Cove's* interpretation of Title VII in terms of age discrimination).

[66] *Id.*

[67] They also lose for failing to satisfy *Wards Cove's* requirement that plaintiffs identify a specific employment practice. Here, the plaintiffs had challenged the pay plan without identifying the specific aspects of the plan that disproportionately affected older workers.

[68] *Smith*, 125 S. Ct. at 1546.

[69] *Id.*

[70] *Id.* at 1539.

[71] *Id.* at 1546.

was not unreasonable.[72]

The practical effect of the *Smith* decision is that (1) many cases that would have been dismissed pretrial will be likely to go to trial, possibly leading to more settlements, and (2) employers are likely to reexamine policies that have a disparate effect on older workers to ensure they are supported by reasonable justifications. In addition, *Smith* opens the door to claims arising under the ADEA that may not be available under state law. For example, in New York, disparate impact is not a viable theory under the Human Rights Law.

Many questions were left unresolved by *Smith*. Most notably, it is unclear what constitutes a reasonable factor other than age. Will cost saving be a reasonable explanation for a lay-off policy that falls more harshly on older workers who tend to be the highest paid employees? Are employee-valuation systems that put older workers at a disadvantage a reasonable factor other than age? Because reasonableness is the test and because the employer does not have to demonstrate business necessity, it will be very difficult for employees ultimately to prevail on disparate impact theory.

III. GENDER: JACKSON V. BIRMINGHAM BOARD OF EDUCATION[73]

Jackson v. Birmingham Board of Education is the third discrimination case of the Term. *Jackson* was a sex discrimination case that involved retaliation against a whistle blower.[74] Roderick

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[72] *Id.*

[73] 125 S. Ct. 1497 (2005).

[74] *Id.* at 1502.

Jackson was hired by the Birmingham School District to coach the girls basketball team.[75] Shortly after he took the job he noticed that the girls team was getting less funding than the boys team, had less access to facilities than the boys' team, and had less access to training and equipment than the boys' team.[76] He complained about the unequal treatment, at which point he started receiving unfavorable job evaluations.[77] Ultimately, he was fired as coach and lost the accompanying salary increment, although he did retain his tenured teaching position.[78]

Jackson sued under Title IX, which prohibits sex discrimination by schools that receive federal funding.[79] The issue before the Court was whether Title IX prohibits retaliation and, if so, whether it supports a private right of action.[80] The lower courts dismissed the case, concluding that Title IX does not support a private right of action for retaliation.[81] The Supreme Court reversed in a five-to-four decision with Justice O'Connor writing for the majority.

The Court held that Title IX prohibits school officials from retaliating against those who complain about sex discrimination and that those whistleblowers do have a private cause of action under the

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[75] *Id.* at 1503.

[76] *Id.*

[77] *Id.*

[78] *Jackson*, 125 S. Ct. at 1503.

[79] *Id.*

[80] *Id.* (noting that certiorari was granted to resolve a conflict in Circuits as to whether private cause of action under Title IX includes retaliation claims).

[81] *Id.* (explaining that the District Court and Eleventh Circuit held that Jackson's suit failed to state a claim because private actions under Title IX do not include retaliation claims).

statute.[82] While Title IX does not explicitly cover retaliation, Justice O'Connor explained that prohibiting discrimination covers a wide range of intentional unequal discrimination.[83] Justice O'Connor relied on earlier decisions where the Court held that Title IX covers sexual harassment, even though sexual harassment is not explicitly mentioned in its text.[84] Justice O'Connor wrote, "Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered."[85]

The majority in *Jackson* had to wrestle with one troubling precedent, *Alexander v. Sandoval,* decided in 2001,[86] where the Court restricted the right to bring private causes of action to enforce Title VI.[87] Title VI prohibits programs that receive federal funding from engaging in racial discrimination.[88] In *Sandoval* the Court

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[82] *Id.* at 1509 (holding that retaliation against individuals complaining of sex discrimination is intentional conduct which violates Title IX).

[83] *Jackson*, 125 S. Ct. at 1507.

> [T]he text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional "discrimination" "on the basis of sex." We reach this result based on the statute's text. In step with *Sandoval*, we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.

Id.

[84] *Id.* at 1504 (citing Cannon v. University of Chicago, 441 U.S. 677, 690-693 (1979) (holding that Title IX implies a private cause of action to enforce its sexual discrimination prohibition)).

[85] *Id.* at 1505.

[86] 532 U.S. 275 (2001).

[87] *Id.* at 293 ("[N]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.") (footnote omitted).

[88] 42 U.S.C. § 2000(d) (2005) ("[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

interpreted Title VI to cover only intentional discrimination and refused to imply a private right of action to sue for disparate impact discrimination.[89] *Sandoval* seemingly signaled the Court's unwillingness to imply private rights of action. Justice Kennedy underscored this point at oral argument when he noted, "This is not the heyday of private causes of action."[90] The school district emphasized that point and argued that a private right of action is not necessary because whistleblowers could be protected by administrative remedies including a complaint to the Department of Education's Office of Civil Rights,[91] which could lead to a cut-off of federal funding, a very powerful disincentive although never utilized by the agency.[92]

Walter Dellinger, arguing for the plaintiff, told the Justices "antidiscrimination laws simply can't be effective if the threat of retaliation deters people in a position to know about the discrimination from complaining about it. It is people like Coach Jackson who make Title IX work."[93]

The majority of the Court agreed finding that Title IX does

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assistance.").

[89] *Jackson*, 125 S. Ct. at 280-81, 293 (explaining that case law indicates that Title VI only applies to intentional discrimination and subsequently holding that Title VI does not create a private cause of action for disparate impact discrimination).

[90] Transcript of Oral Argument at 9, *Jackson*, 125 S. Ct. 1497 (No. 02-1672) (explaining that to establish a private cause of action a plaintiff must demonstrate Congressional intent in the Spending Clause of the Constitution to create a private cause of action for damages).

[91] *Id.* at 27-28.

[92] *Id.* at 28-29. In answering Justice Souter's question as to whether funds have ever been withheld, the School District responded: "[N]o the funds have not been terminated." *Id.* at 28. Justice Ginsberg expressed skepticism about the agency's ability to respond to every complaint. She asked how many times the agency had investigated a complaint in Birmingham and the answer was twice in twenty years.

[93] *Id.* at 3-5.

encompass retaliation and that a private right of action may be maintained. The Court distinguished *Sandoval* by pointing out that in *Sandoval*, the plaintiff was trying to enforce a right found in a regulation, whereas in *Jackson*, the statute prohibited intentional discrimination on the basis of sex, which, according to the Court, includes retaliation.[94] "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result."[95] Also, teachers and coaches, like Roderick Jackson, are "often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."[96]

Justice Thomas, who had served as Commissioner of the Office of Civil Rights, authored the dissenting opinion, which was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.[97] Justice Thomas concluded that a claim of retaliation is not discrimination on the basis of sex,[98] and that Jackson could not sue under the statute because his sex did not play a role in his firing.[99]

The *Jackson* decision is likely to be applied to Title VI, the statute prohibiting race-based discrimination in federal programs. That means that retaliation is prohibited conduct under all of the

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[94] *Jackson*, 125 S. Ct at 1506-07. ("[W]e do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition.").

[95] *Id.* at 1508.

[96] *Id.*

[97] *Id.* at 1510 (Thomas, J., dissenting); *see* The Justices of the Supreme Court (2006), http://www.supremecourtus. gov/about/biographiescurrent.pdf.

[98] *Id.*

[99] *Jackson*, 125 S. Ct at 1511.

major civil rights statutes since Title VII, the ADEA, and the ADA expressly cover retaliation.

Let me conclude by calling your attention to two important cases on the docket this term. The first is *Arbaugh v. Y & H Corp.*, which raises the question 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.[100] 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. She brought and won a Title VII case, but two weeks after the jury verdict, the employer argued that it did not have fifteen employees and therefore was not a covered employer under Title VII. The Court agreed and dismissed the case on the ground that it lacked subject matter jurisdiction. Since the statute of limitations had expired by that time, Jennifer Arbaugh was out of luck.[101]

The second discrimination case on the docket this term is *United States v. Goergia*, which is yet another in the series of cases that question Congress' authority to subject the states to suit.[102] In this case, the question is whether Title II of the ADA abrogates the states' sovereign immunity for suits by disabled prisoners who challenge discrimination by state-operated prisons. The Court has

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[100] Arbaugh v. Y & H Corp., 380 F.3d 219 (5th Cir. 2004), *rev'd,* 126 S. Ct. 1235 (2006).

[101] Since the time of the conference, the United States Supreme Court decided the case. In *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), the Court held that the employee-numerosity requirement was a substantive element of plaintiff's claim and not a jurisdictional requirement.

[102] Goodman v. Ray, 120 F. App'x. 785 (11th Cir. 2004), *cert. granted sub nom.* United States v. Georgia, 125 S. Ct. 2256 (2005).

already ruled, in *Tennessee v. Lane*, that Congress did have the ability to subject the states to suit under Title II as applied to access to courthouses. The question in this case is whether the states can also be subject to suit when the claim concerns the administration of prisons.[103]

[103] In January 2006, the Supreme Court decided *United States v. Georgia*, 126 S. Ct. 877 (2006) and held that Congress had the power to abrogate the states' sovereign immunity and create a cause of action for conduct that violates the Fourteenth Amendment.