# **Survey Article: Labor and Employment Law Update**

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**Text**

**[\*1098]**

During the reporting period, [[1]](#footnote-2)1 both the United States Supreme Court and the Fifth Circuit issued several significant employment-related decisions. [[2]](#footnote-3)2 This Article discusses these decisions in sequence by the various laws they interpret, including the Age Discrimination in Employment Act, [[3]](#footnote-4)3 Title VII of the 1964 Civil Rights Act, [[4]](#footnote-5)4 the 1866 Civil Rights Act, [[5]](#footnote-6)5 the Americans with Disabilities Act, [[6]](#footnote-7)6 the Family and Medical Leave Act, [[7]](#footnote-8)7 the Employee Retirement **[\*1099]** Income Security Act of 1974, [[8]](#footnote-9)8 the Fair Labor Standards Act, [[9]](#footnote-10)9 the National Labor Relations Act, [[10]](#footnote-11)10 the Sarbanes Oxley Act, [[11]](#footnote-12)11 the Worker Adjustment and Retraining Notification Act, [[12]](#footnote-13)12 the Occupational Safety and Health Act, [[13]](#footnote-14)13 Texas common law, and the Federal Arbitration Act. [[14]](#footnote-15)14

I. Age Discrimination in Employment Act Before the Supreme Court

A. Federal Express Corp. v. Holowecki

In Federal Express v. Holowecki, the Supreme Court addressed what constitutes a timely and properly filed "charge of discrimination" under the Age Discrimination in Employment Act (ADEA), [[15]](#footnote-16)15 which requires claimants to have filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) as a prerequisite to filing suit to prosecute a claim of age discrimination in federal court. [[16]](#footnote-17)16

In this case, the claimants were a group of current and former employees who challenged several Federal Express (FedEx) policies as discriminatory on the basis of age. [[17]](#footnote-18)17 One claimant completed an EEOC "Intake Questionnaire" and submitted it to the EEOC, accompanied by a six-page affidavit. [[18]](#footnote-19)18 While the Intake Questionnaire by itself did not request remedial action from the EEOC, the Federal Express Court ruled that the EEOC's regulations concerning the definition of "charge" permitted the combined documentation to be treated as a charge of discrimination. [[19]](#footnote-20)19 The Court was careful to point out that merely submitting paperwork to the EEOC that did nothing more than identify the employer and allege discrimination would not suffice to meet the statutory and regulatory standard of a charge of discrimination. [[20]](#footnote-21)20 Rather, the **[\*1100]** Court emphasized, a charge must include a reasonably construed request for the agency to take remedial action, whether to protect rights covered by the ADEA or discuss settlement of a dispute between the employer and employee. [[21]](#footnote-22)21

The Court further emphasized that the test for determining whether a filing qualifies as a charge of discrimination is an objective one. [[22]](#footnote-23)22 Applying the objective test, the Court held that the inclusion in the claimant's affidavit of a request for the EEOC to force FedEx to end its age discrimination plan sufficed as a request for remedial action so as to qualify as a charge of discrimination. [[23]](#footnote-24)23

B. Gomez-Perez v. Potter

In Gomez-Perez v. Potter, a U.S. Postal Service employee, alleging retaliation for filing an administrative age discrimination complaint, sued the Postal Service. [[24]](#footnote-25)24 The employee claimed that as a federal employee she was entitled to invoke the ADEA's anti-retaliation cause of action and remedial provisions. [[25]](#footnote-26)25 Because the ADEA lacked a specific anti-retaliation section governing claims by federal employees, the Supreme Court was obliged to focus upon the wording of the statute, particularly the "discrimination based on age" clause, to determine if it encompassed retaliation claims. [[26]](#footnote-27)26

The Court concluded that the clause did encompass retaliation claims. [[27]](#footnote-28)27 Evaluating earlier decisions where the Court had interpreted other antidiscrimination statutes, such as Sullivan v. Little Hunting Park, Inc. and Jackson v. Birmingham Board of Education, it held that the wording of the ADEA was broad enough to cover the retaliation claim in question. [[28]](#footnote-29)28 **[\*1101]**

C. Kentucky Retirement Systems v. EEOC

The Kentucky Retirement Systems case involved a retirement plan's disability plan (the Plan) for state employees. [[29]](#footnote-30)29 The Plan provided that workers who became disabled could receive benefits before reaching retirement age. [[30]](#footnote-31)30 The benefits threshold under the Plan was either twenty years of service or reaching the age of fifty-five with at least five years of service. [[31]](#footnote-32)31 Those participants in the Plan who became disabled before reaching retirement age were eligible for the imputing of additional years of service. [[32]](#footnote-33)32 On the other hand, when one member of the Plan opted to continue working after he was eligible for retirement at age fifty-five, then became disabled and retired at age sixty-one, the Plan did not impute additional years of service to him because he was beyond the age where he could accrue such additional years for pension status. [[33]](#footnote-34)33 The EEOC, contending that the failure to impute eligibility years to this older participant occurred solely because he became disabled after age fifty-five (i.e., on account of age), sued the Plan for violating the ADEA. [[34]](#footnote-35)34

By a 5-4 vote, the Supreme Court held that the Kentucky plan did not violate the ADEA. [[35]](#footnote-36)35 Writing for the majority, Justice Breyer ruled that the Plan did not impermissibly rest on proscribed assumptions about age. [[36]](#footnote-37)36 He held that proving a disparate treatment case under the ADEA requires an aggrieved plaintiff to demonstrate that unlawful age discrimination motivated such treatment. [[37]](#footnote-38)37 He then noted that basing eligibility for benefits upon "pension status" did not "embody the evils" redressable under the ADEA, and that the pension eligibility formula was not based upon a "prohibited stereotype" of older workers. [[38]](#footnote-39)38 The Court nevertheless noted that the ADEA could be violated if pension status were merely a '"proxy for age.'" [[39]](#footnote-40)39

Turning to the specifics of the Plan and applying the teachings of Hazen Paper Co. v. Biggins, the Court concluded that the differential treatment at issue was not actually motivated by age. [[40]](#footnote-41)40 There were no individual employment decisions; rather the Plan provided a systemwide set of rules involving pensions, rather than wages. The Court noted that in respect to age, **[\*1102]** the ADEA treats pensions more flexibly than wages. [[41]](#footnote-42)41 It further noted that Congress has approved of programs that calculate "permanent disability benefits using a formula that expressly takes account of age," for example in the administration of Social Security benefits. [[42]](#footnote-43)42

D. Meacham v. Knolls Atomic Power Laboratory

A few years before its decision in Meacham v. Knolls Atomic Power Laboratory, the Supreme Court, in Smith v. City of Jackson, established that aggrieved employees could seek redress under the ADEA on a theory of "disparate impact" independent of any individual disparate treatment. [[43]](#footnote-44)43 In Meacham, the Court turned its attention to the proper characterization and application of the exception to liability within the ADEA, specifically to the situation where "reasonable factors other than age" (RFOA) exist. [[44]](#footnote-45)44

The Court reviewed the statutory language and held that the RFOA exception constitutes an "affirmative defense" rather than a part of the claimant's prima facie case. [[45]](#footnote-46)45 The Court, therefore, held that employers bear the dual burdens of production and persuasion to avoid liability on the basis of RFOA. [[46]](#footnote-47)46

II. Title VII of the 1964 Civil Rights Act: Gender Discrimination in Alvarado v. Texas Rangers [[47]](#footnote-48)47

After working with the Texas Department of Public Safety (DPS) for several years, Juanita Alvarado applied to the department's Texas Rangers Division as a sergeant. [[48]](#footnote-49)48 At the time, Ms. Alvarado was a sergeant in the **[\*1103]** department's Special Crimes Division. [[49]](#footnote-50)49 When the DPS denied her a position with the Rangers, she filed a claim for sex discrimination. [[50]](#footnote-51)50

In reviewing the district court's grant of summary judgment for the DPS, the Fifth Circuit first recited the well-known four-part prima facie case that plaintiffs must initially satisfy when presenting a claim for gender-based discrimination. [[51]](#footnote-52)51 It then confronted the central issue in the case: whether Ms. Alvarado was the victim of an adverse employment action. [[52]](#footnote-53)52 The district court held that Ms. Alvarado had not been a victim because the position she sought would have only been a "lateral transfer" for her. [[53]](#footnote-54)53 Ms. Alvarado challenged this conclusion, contending that the position she sought was a "promotion" because of the stature of the Texas Rangers. [[54]](#footnote-55)54

The Fifth Circuit analyzed its prior holdings in acknowledging that it had "never spoken precisely on what distinguishes a purely lateral transfer from a promotion." [[55]](#footnote-56)55 The court, however, had previously determined a transfer amounting to a demotion could qualify as an "adverse employment action." [[56]](#footnote-57)56 Fifth Circuit precedent indicated that a demotion could occur if the new position were to prove "objectively worse-such as being less prestigious or less interesting or providing less room for advancement." [[57]](#footnote-58)57

Applying this analysis to the promotion context, the court stated that the denial of a transfer, under certain circumstances, could qualify as adverse, even without a loss of pay or other tangible benefits, if the position sought was "objectively better." [[58]](#footnote-59)58 Given the stature of the Texas Rangers Division, the court held that there was sufficient evidence to raise a fact issue regarding whether Ms. Alvarado's rejection was an adverse employment action. [[59]](#footnote-60)59 Consequently, the court reversed the summary judgment in favor of the employer and remanded for further proceedings. [[60]](#footnote-61)60

**[\*1104]**

III. 42 U.S.C. § 1981 Before the Supreme Court: Cbocs West, Inc. v. Humphries

The 1866 Civil Rights Act provides that "[a]ll persons within the jurisdiction of the U.S. shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." [[61]](#footnote-62)61 In Runyon v. McCrary, the Supreme Court interpreted this statute to prohibit private acts of racial discrimination in the workplace. [[62]](#footnote-63)62 The question raised in CBOCS West, Inc. v. Humphries was whether § 1981 "encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract- related right." [[63]](#footnote-64)63 The Court held that it did. [[64]](#footnote-65)64

Hedrick Humphries, an African-American assistant manager at Cracker Barrel, had complained about the company's treatment of another African-American employee. [[65]](#footnote-66)65 When he was subsequently fired, he filed claims of racially discriminatory treatment and retaliation. [[66]](#footnote-67)66

As noted above in the Gomez-Perez discussion, the focal point of the Humphries analysis derived from the Court's decisions in Sullivan v. Little Hunting Park, Inc. and Jackson v. Birmingham Board of Education. [[67]](#footnote-68)67 Sullivan, in particular, involved a claim under a companion 1866 Civil Rights Act provision, 42 U.S.C. § 1982, which regards the right of every citizen to hold, sell, or purchase real property. [[68]](#footnote-69)68 The Sullivan Court upheld the right of a white man to sue for retaliation because he complained about a homeowners association's racially motivated treatment of a black man. [[69]](#footnote-70)69 Humphries also acknowledged that its precedent Runyon v. McCrary interpreted § 1981 in harmony with § 1982 on account of the "sister statutes' common language, origin, and purposes." [[70]](#footnote-71)70

The Court swept aside the doctrinal challenge posed by the employer, which claimed that because Congress had amended § 1981 in 1991 without including an "explicit" anti-retaliation provision, it did not intend to imbue § 1981 with anti-retaliation scope. [[71]](#footnote-72)71 The Court asserted that this failure was **[\*1105]** more plausibly explained by "the fact that, given Sullivan and the new statutory language nullifying [the Court's Patterson v. McLean Credit Union decision], there was no need for Congress to include explicit language about retaliation." [[72]](#footnote-73)72

IV. Americans with Disabilities Act

During the reporting period, the U.S. Court of Appeals for the Fifth Circuit issued three noteworthy decisions interpreting and applying the American with Disabilities Act [[73]](#footnote-74)73 (ADA). The Texas Court of Appeals in Beaumont also issued a decision extrapolating the Fifth Circuit's analysis of the ADA to determine a question of first impression under Texas's equivalent statute, known as the Texas Commission on Human Rights Act. [[74]](#footnote-75)74

A. Fifth Circuit Decisions

1. Pinkerton v. Spellings

Disabled federal employees who seek to vindicate rights when claiming disability-based discrimination in employment may sue the federal government under the Rehabilitation Act. [[75]](#footnote-76)75 The Fifth Circuit has held that the Rehabilitation Act must be interpreted with reference to the standards and boundaries established in its interpretation and application of the ADA. [[76]](#footnote-77)76

In this case, Robert Pinkerton sued the U.S. Department of Education over the termination of his employment. [[77]](#footnote-78)77 At the time, Pinkerton suffered from arthrogryposis, a disease that causes developmental abnormalities. [[78]](#footnote-79)78 The primary issue before the Fifth Circuit was the causation standard under § 501 the Rehabilitation Act. [[79]](#footnote-80)79 At trial, the district court instructed the jury to decide whether Mr. Pinkerton was terminated "solely because of his disability." [[80]](#footnote-81)80 Pinkerton challenged this jury instruction on the basis that the issue should **[\*1106]** have been whether his disability "was a motivating factor" in the termination decision. [[81]](#footnote-82)81

The analytical conundrum presented in the case arose from the peculiar wording of the Rehabilitation Act. Section 504 of the statute, which also proscribes discrimination on the basis of disability, specifically states that in interpreting it, courts are to use the standards applied under the ADA. [[82]](#footnote-83)82 That section, however, also indicates that no "otherwise qualified individual with a disability" shall "solely by reason of her or his disability" be subjected to discrimination. [[83]](#footnote-84)83 In contrast, § 501 of the Rehabilitation Act contains no language overriding standards established under the ADA. [[84]](#footnote-85)84 Rather, it explicitly incorporates the ADA standards. [[85]](#footnote-86)85 Noting this language, and also noting the amendments to the Rehabilitation Act in 1992 immediately after the adoption of the ADA, the Pinkerton court concluded that Congress intended courts to apply an identical causation standard to claims by federal employees under the Rehabilitation Act as those brought by private employees under the ADA. [[86]](#footnote-87)86

The court then turned to an "unsettled" question: the proper standard for causation under the ADA. [[87]](#footnote-88)87 Construing the language of the statute and the interpretations of it by other circuit courts, the court concluded that the proper causation standard under the ADA is a "motivating factor" test and that this standard also applies to claims pursued under § 501 of the Rehabilitation Act. [[88]](#footnote-89)88 The court, therefore, reversed the judgment of the lower court and remanded for a new trial. [[89]](#footnote-90)89

2. Arredondo v. Gulf Bend Center

In Arredondo v. Gulf Bend Center, the Fifth Circuit considered the claim of a plaintiff suffering from bipolar disorder who sued his employer for loss of his job as a mental health counselor. [[90]](#footnote-91)90 After considering the contours of the prima facie case to demonstrate disabilities discrimination, the court focused on one of those contours: that the claimant suffers from a disability. [[91]](#footnote-92)91 The **[\*1107]** ADA defines a disability as "'a physical or mental impairment that substantially limits one or more of the major life activities.'" [[92]](#footnote-93)92

The court determined that on the record before it, Arredondo had failed to demonstrate that his impairment substantially limited a major life activity. [[93]](#footnote-94)93 In reaching this conclusion, the court noted that the evidence presented by Arredondo intimated that he "does well with [his] medication" in regulating the impact of the mental impairment. [[94]](#footnote-95)94 Accordingly, the court ruled that Arredondo failed to demonstrate that he was disabled under the ADA. [[95]](#footnote-96)95 Note, however, that in the ADA context, the impact of medication upon a person's impairment is now diminished, if not eliminated, because of the recent changes to the ADA that became effective in January 2009. [[96]](#footnote-97)96

3. Cooper v. Dallas Police Ass'n

In another ADA case, the Fifth Circuit considered a female police officer's claim that the Dallas Police Association's board, which the court noted was not her employer, retaliated against her in violation of the ADA. [[97]](#footnote-98)97 The plaintiff, Cooper, alleged that on account of her disability and her inability to perform her duties as an officer, the board denied her request for financial assistance for legal costs she incurred in testifying before the Texas Commission on Human Rights regarding a fellow officer's complaint against the association. [[98]](#footnote-99)98

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." [[99]](#footnote-100)99 Because Cooper's complaint had stated that "her ailments made her 'unable to perform her duties as a Dallas police officer,'" the Fifth Circuit ultimately refused to consider the ADA retaliation claim. [[100]](#footnote-101)100 Cooper thus held that she was not a qualified individual with a disability because of her inability to perform the essential functions of her job. [[101]](#footnote-102)101

**[\*1108]**

B. Texas Court Decision: LeBlanc v. Lamar State College

Interpreting the disabilities discrimination component of the Texas Commission on Human Rights Act (TCHRA) and analyzing Fifth Circuit decisions under the ADA for guidance, the Beaumont Court of Appeals evaluated the claims brought by Dana LeBlanc, who suffered from a neurological disorder known as Friedreich's ataxia. [[102]](#footnote-103)102 Ms. LeBlanc claimed she was wrongfully discriminated against by Lamar State College when she applied for a full-time position as a lab technician at a learning center, and that she was the subject of unlawful harassment because of her condition. [[103]](#footnote-104)103 The trial court granted summary judgment in favor of the employer on all claims. [[104]](#footnote-105)104

Regarding the discrimination claim, the court of appeals considered the circumstances surrounding the position in question and LeBlanc's qualifications, particularly her educational background, and held that she was not a "qualified individual with a disability." [[105]](#footnote-106)105 The court noted that the requirements of the job included the ability to conduct tutoring of English and math students, which LeBlanc admitted she was not qualified to do. [[106]](#footnote-107)106

Regarding the harassment claim, the court opined that there was no Texas case on point regarding whether a claim of "disability-based harassment" was viable under the TCHRA. [[107]](#footnote-108)107 Reaching to Fifth Circuit precedent, the court found that since 2001, the Fifth Circuit has construed the ADA as "embrac[ing] claims of disability-based harassment." [[108]](#footnote-109)108 But for workplace harassment "to rise to the level of an actionable offense[,] the disability-based harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." [[109]](#footnote-110)109 Relying on this federal case law, the court held that LeBlanc failed to submit sufficient evidence to satisfy the "high" standard applicable to disability-based harassment. [[110]](#footnote-111)110 Ms. Leblanc could only recall occasional instances of alleged harassment over a two-year period, whereas Lamar State College presented evidence demonstrating that the complained-of actions were not sufficiently pervasive. [[111]](#footnote-112)111 Therefore, the court of appeals affirmed the granting of summary judgment. [[112]](#footnote-113)112

**[\*1109]**

V. Family and Medical Leave Act

A. Downey v. Strain

In Downey v. Strain, the Fifth Circuit took up what it characterized as an issue of first impression: the validity of the Family and Medical Leave Act's [[113]](#footnote-114)113 (FMLA) two-day individualized notice requirement. [[114]](#footnote-115)114 Susan Downey worked in the corrections division of a local sheriff's office. [[115]](#footnote-116)115 She took leave in late 2002 to have surgery on her knee and shoulder. [[116]](#footnote-117)116 Her employer, Sheriff Rodney Strain, informed her that this was being designated as FMLA leave for the period from the date of the surgery in December 2002 to the employee's date of return in March 2003, a total of 424 hours of leave, resulting in a remaining balance of fifty-two hours of FMLA leave. [[117]](#footnote-118)117

Ms. Downey then injured her knee in June 2003 in a work-related incident but continued to work through the end of July, when she took a second leave until October 2003 to have surgery on her knee. [[118]](#footnote-119)118 The sheriff characterized this as FMLA leave as well, but he did not specifically notify her that he was doing so. [[119]](#footnote-120)119 Because the sheriff charged her with additional FMLA leave, Ms. Downey's FMLA leave for the year was exhausted by August 7, 2003. [[120]](#footnote-121)120 As a result, when she returned to work in October, she was reassigned to another division, which did not provide the same fringe benefits as she had enjoyed in her previous position. [[121]](#footnote-122)121

These actions prompted Ms. Downey to sue the sheriff for FMLA violations. [[122]](#footnote-123)122 Her basic claim was that had she known in July 2003 what the sheriff would do with her remaining FMLA leave, she would have deferred that surgery until she had accrued more FMLA leave. [[123]](#footnote-124)123 The district court denied summary judgment on the FMLA claim on the basis that the sheriff had failed to provide Ms. Downey with individualized written notice of the FMLA leave designation as required by the notice provisions in FMLA regulations. [[124]](#footnote-125)124

**[\*1110]**

The Fifth Circuit recognized that this case presented a new issue for the court to resolve concerning the validity of the FMLA's individualized notice regulations. [[125]](#footnote-126)125 The court found instructive the Supreme Court's decision in Ragsdale v. Wolverine World Wide, Inc. in which the Court struck down FMLA regulations that sought to impose liability even when it was not shown that losses had been sustained "by reason of the violation." [[126]](#footnote-127)126 It also invoked its own prior decision in Lubke v. City of Arlington in which it upheld an FMLA requirement obligating an employee to submit certification from a healthcare provider to substantiate a request for FMLA leave. [[127]](#footnote-128)127

From these decisions, the court extrapolated the principle that FMLA regulations "are not arbitrary, capricious, or manifestly contrary to the FMLA as long as they are enforced in a manner that is consistent with the FMLA's remedial scheme, which requires an employee to provide prejudice as a result of . . . noncompliance." [[128]](#footnote-129)128 Applying that principle to the facts before it, the court held that Ms. Downey had demonstrated that the sheriff's noncompliance caused actual prejudice because individualized notice would have alerted her to postpone her surgery to a different FMLA leave period. [[129]](#footnote-130)129 On this basis, the court held that it was appropriate to enforce the notice regulations as consistent with FMLA's remedial scheme and upheld a jury verdict for damages in favor of the employee. [[130]](#footnote-131)130

B. Durose v. Grand Casino of Mississippi, Inc.

In Durose, the Fifth Circuit considered the important question of the impact, if any, of an employer's misstatement about the duration of FMLA leave. [[131]](#footnote-132)131 The employer had erroneously indicated to the employee that her FMLA leave would last one month beyond the actual deadline for statutory FMLA leave. [[132]](#footnote-133)132 The Fifth Circuit held that such a misstatement did not create a statutory right to extra FMLA leave beyond the maximum leave permitted under the statute. [[133]](#footnote-134)133

C. Lyons v. North East Independent School District

In Lyons, the Fifth Circuit considered whether an employee had the right to take leave under the FMLA. [[134]](#footnote-135)134 The employer utilized a fiscal year ending **[\*1111]** June 30 for purposes of tracking leave. [[135]](#footnote-136)135 The employee took an approved FMLA leave in September 2005 to care for her daughter and returned to work on October 24, 2005. [[136]](#footnote-137)136 She was then granted an additional FMLA leave in late February 2006 for her own medical condition and returned to work on March 21, 2006. [[137]](#footnote-138)137 In August 2006, she again sought leave for surgery, but this request was denied by the employer on the basis that the employee had not completed the requisite 1,250 hours of work during the twelve months preceding her request. [[138]](#footnote-139)138 Instead, the employer placed the employee on leave under its temporary disability policy. [[139]](#footnote-140)139 She accordingly took leave to have surgery and returned to work in early September 2006, but because her leave was not FMLA leave, her position was filled in her absence, and she was obliged to accept the employer's offer to return to work in a different position with less pay. [[140]](#footnote-141)140

The employee sued the employer, claiming that it had violated the FMLA by granting her only seven weeks of FMLA leave instead of twelve and then demoting her when she took what she contended was FMLA leave. [[141]](#footnote-142)141 Focusing on the wording of the FMLA, including the requirement of twelve work weeks of leave in every twelve month period, [[142]](#footnote-143)142 the Fifth Circuit determined that a new FMLA leave year had commenced in July 2006 and that Ms. Lyons could not satisfy the criterion of having worked 1,250 hours in the prior twelve months. [[143]](#footnote-144)143 The court, therefore, upheld the denial of her claims. [[144]](#footnote-145)144

VI. Employee Retirement Income Security Act [[145]](#footnote-146)145

A. United States Supreme Court Decisions

1. LaRue v. DeWolff, Boberg & Associates

In his attempt to migrate to "safer" investments, James LaRue sought to have his employer switch his 401(k) monies from one mutual fund to another. [[146]](#footnote-147)146 The plan administrator failed to make the change, allegedly costing **[\*1112]** LaRue an estimated $ 150,000 in lost profits. [[147]](#footnote-148)147 Mr. LaRue then sued his former employer and the 401(k) plan under ERISA § 502(a)(3), claiming the plan administrator breached his fiduciary duty by neglecting to follow properly the investment instructions. [[148]](#footnote-149)148

The issue presented in LaRue was whether an individual could bring an action under ERISA to recover the losses when the essence of the claim was the recovery of monetary damages, which is not traditionally categorized as equitable relief. [[149]](#footnote-150)149 Mr. LaRue argued that because the defendants failed to invest the money as he directed, his account was depleted and he was entitled to receive "make-whole" or other equitable relief under § 502(a)(3). [[150]](#footnote-151)150 The district court dismissed his claims, holding that because the defendant did not possess any of the funds belonging to him, the relief he sought was monetary damages, a remedy not available as equitable relief under § 502(a)(3). [[151]](#footnote-152)151

The Supreme Court held that even though ERISA does not provide a remedy for individual injuries distinct from plan injuries, a plan participant in a 401(k) plan can sue a plan fiduciary under § 502(a)(2) to recover losses caused when a fiduciary breach impairs the value of plan assets in an individual account. [[152]](#footnote-153)152 Thus, the Court decided that under the equitable relief portion of ERISA, fiduciaries should be liable for money damages as part of the remedies available to holders of private accounts. [[153]](#footnote-154)153

2. Metropolitan Life Insurance Co. v. Glenn

Since the landmark Supreme Court decision in Firestone Tire & Rubber Co. v. Bruch, courts have struggled with the issue of the level of deference to be given to a fiduciary's decision to deny a claim when that fiduciary is operating under a conflict of interest. [[154]](#footnote-155)154 The Firestone Court confirmed that traditional trust law principles should guide courts in determining the appropriate standard for reviewing a denial of benefits. [[155]](#footnote-156)155 It stated that under the Restatement of Trusts, a benefit plan that is operated under a conflict of interest requires that the "conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" [[156]](#footnote-157)156 The Court did not resolve the question of when such a conflict arises, nor the manner in which courts must **[\*1113]** take such conflicts into account. [[157]](#footnote-158)157 Metropolitan Life Insurance v. Glenn thus presented the issue of the impact of a fiduciary's conflict of interest upon ERISA rights when assessing benefits claims. [[158]](#footnote-159)158

In Glenn, Metropolitan Life Insurance acted as both a plan administrator and insurer of a disability plan maintained by Sears, Roebuck & Company. [[159]](#footnote-160)159 Under that plan, it processed a claim for disability benefits by a Sears employee who had a heart condition. [[160]](#footnote-161)160 Metropolitan initially approved short-term disability benefits for the employee based on opinions from a number of doctors that the employee was incapable of performing any kind of work. [[161]](#footnote-162)161 Even though the plan provided for an offset of benefits if a participant also received Social Security disability payments, Metropolitan specifically encouraged the employee to file an application under the Social Security disability insurance program. [[162]](#footnote-163)162 The Social Security Administration granted the application, finding the employee totally unable to work. [[163]](#footnote-164)163

Armed with this determination, Metropolitan deducted the amount of the employee's Social Security payments from the short-term disability payments the employee was to receive from the plan. [[164]](#footnote-165)164 At the end of the employee's short-term disability coverage period, Metropolitan re-examined her status to determine eligibility for long-term disability payments. [[165]](#footnote-166)165 Despite the findings of a majority of physicians and the decision of the Social Security Administration, Metropolitan concluded that the employee was able to perform other jobs and thus not entitled to receive long-term disability benefits. [[166]](#footnote-167)166 Evidence produced in the district court indicated that in denying this claim, Metropolitan ignored medical opinions contrary to its conclusion and failed to provide complete information of the employee's medical status to its internal medical experts. [[167]](#footnote-168)167

Because the company insuring the plan was the same company administering the plan, the Court stated that a conflict of interest existed for the plan administrator by its wearing these two hats simultaneously. [[168]](#footnote-169)168 It unanimously opined that such a conflict occurs whenever the claims decision-maker has an interest at odds with those of the plan participants and **[\*1114]** beneficiaries. [[169]](#footnote-170)169 The Court's broad view of what constitutes a conflict of interest, however, was not matched by its view of whether a conflict of interest automatically invalidates the plan administrator's decision adverse to the claimant, particularly when the plan administrator is not also the employer. [[170]](#footnote-171)170 The lower court had held that Metropolitan Life did operate under a conflict and that as a result, its decision was not entitled to deference, but the Supreme Court declined to recognize a standard of de novo review, opting in favor of a "factor test" to decide whether the plan administrator abused its discretion. [[171]](#footnote-172)171

Essentially, Glenn adopted a totality of the circumstances test to review a denial of benefits, directing that courts should give weight to the conflict of interest factor against the backdrop of the circumstances particular to each case. [[172]](#footnote-173)172 Applying this framework to the situation before it, the Court concluded that the Sixth Circuit correctly took the existence of the conflict of interest into account, along with other factors, when determining that the insurance company abused its discretion in denying benefits. [[173]](#footnote-174)173

B. Fifth Circuit Decisions

1. Washington v. Murphy ***Oil*** USA, Inc.

ERISA requires employers to use a "summary plan description" (SPD) as a "shorter, simplified version of the plan itself" that is "provided to employees with the goal of allowing them to understand what would otherwise be a complex, somewhat incomprehensible document." [[174]](#footnote-175)174 Unfortunately, this simplification can result in conflicts between the terms of the SPD and the more detailed plan, which was the issue before the Fifth Circuit in Washington. [[175]](#footnote-176)175

Willie Washington had requested disability benefits from his employer, but the employer notified him that he did not qualify: he had only eight years of service, and the disability benefits plan specifically required at least ten years of service to qualify. [[176]](#footnote-177)176 Although the plan itself did describe vesting as only applicable to those with at least ten years of service, the employer's SPD **[\*1115]** defined vesting as the completion of five years of service. [[177]](#footnote-178)177 Unsurprisingly, the Fifth Circuit held that these two provisions conflicted. [[178]](#footnote-179)178 The court noted that under its applicable precedent, Hansen v. Continental Insurance Co., in the event of such a conflict, the terms of the SPD "control and are binding." [[179]](#footnote-180)179

The court then turned to the question of whether the employee had to demonstrate reliance upon the conflicting terms, a question it had previously repeatedly declined to address. [[180]](#footnote-181)180 Identifying a "five-way" circuit split on this question, the court concluded that "when the terms of an SPD and an ERISA plan conflict and the terms of the conflicting SPD unequivocally grant the employee a vested right to benefits, the employee need not show reliance or prejudice." [[181]](#footnote-182)181 The court thus held that given the SPD's unequivocal language in this case, the employee's right to benefits vested after five years of service. [[182]](#footnote-183)182

2. Custer v. Murphy ***Oil*** USA, Inc.

In Custer v. Murphy ***Oil*** USA, Inc., the Fifth Circuit addressed the scope of notice required to be given to ERISA plan participants when the terms of the plan change. [[183]](#footnote-184)183

This issue resulted from a December 2003 accident at the home of Michael Custer, who became totally disabled and unable to return to work. [[184]](#footnote-185)184 He inquired about medical coverage, and his employer responded that because he was totally disabled, his employment was being terminated and he would no longer qualify for group insurance coverage. [[185]](#footnote-186)185 The Group Insurance Plan (the Plan) previously had provided for such coverage until Mr. Custer turned sixty-five years of age; however, the Plan was modified in early 2003 to allow insurance coverage to end when employment was terminated. [[186]](#footnote-187)186

The company claimed that in November 2002, during the "open enrollment period," it had alerted employees that there may be changes to the Plan. [[187]](#footnote-188)187 Once these changes were approved in December 2002, the company claimed it had mailed a written notice to Plan participants that informed them **[\*1116]** of the changes effective January 1, 2003. [[188]](#footnote-189)188 It further claimed that it had sent out a new Summary Plan Description identifying the changes in coverage in March 2003. [[189]](#footnote-190)189 Mr. Custer denied receiving either of these notices. [[190]](#footnote-191)190

The case, therefore, focused upon whether the employer had properly notified Mr. Custer of the changes to the Plan. [[191]](#footnote-192)191 The Fifth Circuit noted that ERISA has specific notice requirements and that the Secretary of Labor has bolstered these requirements by adopting a regulation imposing upon plan administrators the obligation to "use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." [[192]](#footnote-193)192 But the court also noted that the regulations allow plan administrators to fulfill the notice obligation "through first class mail." [[193]](#footnote-194)193 Even so, the court declined to adopt a "mailbox rule" approach advocated by the company (i.e., whether proper and timely mailing creates a rebuttable presumption of receipt) because the issue was not "actual receipt" by the plan participant but whether the plan administrator had used the regulation's measures that were "reasonably calculated to ensure actual receipt." [[194]](#footnote-195)194

The court concluded that affidavit testimony from the plan administrator aside, the company had no physical evidence to prove mailing or any other form of delivery; therefore, the company could not meet its summary judgment burden to entitle it to judgment as a matter of law. [[195]](#footnote-196)195 As a result, the court reversed the summary judgment granted to the company and remanded for further proceedings due to the existence of a genuine issue of material fact. [[196]](#footnote-197)196

3. Amschwand v. Spherion Corp.

In Amschwand, the Fifth Circuit addressed whether the ERISA phrase "other appropriate equitable relief" allows a claimant to recover "make whole" damages in the form of payment of life insurance benefits that would have accrued but for the plan administrator's breach of fiduciary duty. [[197]](#footnote-198)197

The particular plan participant in this case suffered from cancer, and while he was on medical leave receiving treatment, the employer switched insurance companies. [[198]](#footnote-199)198 This change resulted in excluding the participant from **[\*1117]** coverage, even though the company assured him in response to his repeated inquiries that his life insurance coverage was in place and not affected by the change. [[199]](#footnote-200)199 The participant died, and his wife only learned of the exclusion when she applied for the life insurance benefits she thought had accrued under the plan. [[200]](#footnote-201)200

Applying the existing case law, particularly the Supreme Court's decision in Great-West Life & Annuity Ins. Co. v. Knudson, the Fifth Circuit concluded that ERISA did not permit Mrs. Amschwand to recover money damages against the company. [[201]](#footnote-202)201 Instead, she could only recover a return of premiums (the traditional equitable remedy) for coverage that never ripened. [[202]](#footnote-203)202

4. McAteer v. Silverleaf Resorts

Turning to the perennial issue of ERISA preemption, the Fifth Circuit in McAteer v. Silverleaf Resorts held that Texas state law negligence claims were not pre-empted under the facts of the case. [[203]](#footnote-204)203

Silverleaf Resorts, a non-subscriber to Texas workers' compensation insurance, provided benefits to its employees through an "Employee Injury Benefit Plan" (the Plan), which is governed by ERISA. [[204]](#footnote-205)204 The Plan gave no-fault benefits for a job-related injury and required arbitration of any benefits disputes. [[205]](#footnote-206)205 Le Ann McAteer, a participant in the Plan, claimed to have suffered a job-related injury in July 2005, but she did not report the injury to Silverleaf until three months later, after her employment had ended. [[206]](#footnote-207)206 The plan administrator denied the claim for failure to report timely the injury, to seek advance approval for medical treatment, or to use a plan-approved physician. [[207]](#footnote-208)207

In response, Ms. McAteer filed suit in Texas state court by asserting various state law negligence causes of action, such as failing to maintain a safe workplace. [[208]](#footnote-209)208 Silverleaf removed the lawsuit to federal court by asserting federal jurisdiction on the basis of complete ERISA preemption. [[209]](#footnote-210)209 The district court denied the employee's motion to remand, compelled the parties to arbitration pursuant to the Plan's terms, and dismissed the lawsuit. [[210]](#footnote-211)210 Ms. McAteer appealed and challenged the determination that her state law claims were pre-empted by ERISA based on the Fifth Circuit's groundbreaking **[\*1118]** decision in Hook v. Morrison Milling Co., which established that ERISA did not pre- empt Texas negligence claims. [[211]](#footnote-212)211 Silverleaf responded that Hook was no longer good law as the result of the Supreme Court's decision in Aetna Health Inc. v. Davila. [[212]](#footnote-213)212

The Fifth Circuit rejected this contention. [[213]](#footnote-214)213 It determined that Davila was only concerned with complaints about denials of coverage promised under the terms of an ERISA plan. [[214]](#footnote-215)214 Thus, Hook still controlled, and the negligence claims were independent of ERISA. [[215]](#footnote-216)215

5. Shearer v. Southwest Service Life Insurance Co.

In this case, the Fifth Circuit addressed whether the employer's "plan" at issue qualified as an ERISA plan. [[216]](#footnote-217)216 The plaintiff, Lance Shearer, owned 50% of a company and also served as one of its employees. [[217]](#footnote-218)217 He had applied for health insurance for himself and his family, and his employer paid the premiums. [[218]](#footnote-219)218 When a dispute arose over the amount the insurer was obligated to pay regarding a claim under this policy, Mr. Shearer sued the insurer and its agent in state court for various state law causes of action. [[219]](#footnote-220)219 The insurer then removed the lawsuit to federal court, claiming that the insurance policy at issue was covered by ERISA, and that therefore the employee's claims were preempted by ERISA. [[220]](#footnote-221)220 In federal district court, the case was dismissed on the basis that the claims failed to qualify for ERISA relief. [[221]](#footnote-222)221

On appeal, the Fifth Circuit court first reviewed the ERISA definition of an "employee welfare benefit plan" to determine whether the insurance policy in question qualified as such a plan. [[222]](#footnote-223)222 ERISA defines such a plan as follows:

[A]ny plan, fund or program which was . . . established or maintained by an employer . . . to the extent that such plan was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital **[\*1119]** care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . . [[223]](#footnote-224)223

The court then used a three-prong test to determine whether an employee benefit arrangement fits within that definition: that the arrangement (1) is a plan, (2) is not excluded from ERISA coverage by safe harbor provisions of the Department of Labor, and (3) is established or maintained by the employer with the intent to benefit employees. [[224]](#footnote-225)224 The insurer challenged the last prong of the test. [[225]](#footnote-226)225

The court noted it had previously held that "if an employer does no more than purchase insurance for its employees and has no further involvement with the collection of premiums, administration of the policy, or submission of claims," then the employer has not established an ERISA plan. [[226]](#footnote-227)226 On the basis of these criteria, the court determined that the mere purchase of one policy for one employee (along with a separate policy for the employee's wife), but for no others, did not constitute establishment of an ERISA plan. [[227]](#footnote-228)227 Ultimately, the court vacated the order of dismissal and remanded to the district court for further proceedings. [[228]](#footnote-229)228

6. E.I. DuPont De Nemours & Co. v. Sawyer

The Sawyer case also involved ERISA preemption issues. [[229]](#footnote-230)229 When DuPont separated a portion of its operations into a subsidiary, it negotiated with the union concerning the formation of an independent collective bargaining unit. [[230]](#footnote-231)230 In doing so, DuPont represented that members of the new unit would be entitled to identical DuPont compensation, benefits plans, and policies. [[231]](#footnote-232)231 Many eligible employees signed up for the transfer to the new unit because of such representations. [[232]](#footnote-233)232 Thus upon transferring, these employees had compensation and benefit plans identical to those that they had previously enjoyed. [[233]](#footnote-234)233

Shortly thereafter, DuPont sold the subsidiary to Koch Industries. [[234]](#footnote-235)234 The employees in that group immediately suffered losses in wages, overtime, retirement age, bonuses, stock options, and benefits. [[235]](#footnote-236)235 This triggered a **[\*1120]** lawsuit by the employees against DuPont. They claimed fraud and fraudulent inducement on the basis of DuPont's alleged misrepresentation concerning whether it would sell the newly created subsidiary to another entity-an event the employees claimed DuPont had to have known of at the time of the misrepresentations. [[236]](#footnote-237)236 DuPont responded that these claims were pre- empted by ERISA. [[237]](#footnote-238)237

The Fifth Circuit first evaluated the ERISA preemption by stating that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." [[238]](#footnote-239)238 The court also considered DuPont's argument that the Supreme Court's holding in Varity Corp. v. Howe permits beneficiaries of an ERISA plan to sue for individual relief against a plan administrator for breach of fiduciary duty; therefore, the proper law for the employees to have invoked in this lawsuit was ERISA, not Texas law. [[239]](#footnote-240)239

The court rejected DuPont's claim that the employees' contentions mirrored those in Varity. [[240]](#footnote-241)240 The court deemed the misrepresentations at issue in Varity to be "entirely bound up with communications regarding the ERISA plan," an act that had caused the Supreme Court to view the "intentional representations about the future of plan benefits" to be an "act of plan administration," and therefore covered by ERISA. [[241]](#footnote-242)241 By contrast, in this case the misrepresentations at issue did "not appear to have occurred in the context of plan administration." [[242]](#footnote-243)242 Thus, the court held that the state law claims were not pre-empted by ERISA's civil enforcement provision. [[243]](#footnote-244)243

The Fifth Circuit then considered the impact of ERISA's express preemption clause. [[244]](#footnote-245)244 It reiterated the two-part test applied to assess express preemption: "(1) the claim 'addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of the Plan; and (2) the claim directly affects the relationship among traditional ERISA entities-the employer, the plan and its fiduciaries, and the participants and **[\*1121]** beneficiaries.'" [[245]](#footnote-246)245 Applying this test, the court held that the focal point of the employees' claims was DuPont's alleged fraudulent inducement of them to terminate employment with DuPont and accept employment with its newly formed subsidiary-claims that related only to misrepresentations about DuPont's intentions to sell the newly formed subsidiary. [[246]](#footnote-247)246 Thus, the court again concluded that the employees' claims were not pre-empted by ERISA. [[247]](#footnote-248)247

7. Kirschbaum v. Reliant Energy

The Kirschbaum case involved a class action claim by employees alleging breach of fiduciary duty by an employer that invested the "individual account plan" almost entirely in the company's common stock. [[248]](#footnote-249)248 As is typical in these cases, the dispute flared because the company's common stock had lost 50% of its value in one week's time following the revelation that some company employees had engaged in sham transactions for the purpose of generating the appearance of "revenue activity." [[249]](#footnote-250)249 The employees sought to recover the lost value in their common stock by contending that the company and the plan administrator should have known that investing in company stock was not a prudent investment. [[250]](#footnote-251)250

The Kirschbaum court commenced its analysis with a recitation of applicable ERISA principles. [[251]](#footnote-252)251 First, ERISA permits an employer who sponsors a plan also to serve as the fiduciary of that plan. [[252]](#footnote-253)252 Such a role imposes upon the employer and those who manage the plan "strict statutory duties, including loyalty, prudence, and diversification." [[253]](#footnote-254)253 Recognizing that prior common law would ordinarily preclude an employer's investing in its own stock as an impermissible conflict of interest, the court noted that ERISA specifically exempted such investments from certain ERISA fiduciary requirements, such as a "cap" on the percentage of a permissible investment in the company's own securities and an exemption from the "duty to diversify and the related duty of prudence." [[254]](#footnote-255)254

On the basis of these principles, the court concluded that ERISA exempted this particular plan from a duty to diversify, that ERISA likewise did not permit the fiduciaries to exercise any discretion under the terms of the plan **[\*1122]** regarding investments outside of company stock, and that nothing in applicable law required the fiduciary to disobey the plan's requirements in the name of prudence to halt the purchase of the company's common stock. [[255]](#footnote-256)255 Citing the leading case of Moench v. Robertson from the Third Circuit, the court ruled that the fiduciaries in this case could not be placed "in the untenable position of having to predict the future of the company's stock performance." [[256]](#footnote-257)256 To the court, this position was "untenable" because a fiduciary "could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded." [[257]](#footnote-258)257 On this basis, the court upheld the lower court's grant of summary judgment to the defendants. [[258]](#footnote-259)258

VII. Fair Labor Standards Act

A. Hagan v. Echostar Satellite, L.L.C.

The Fifth Circuit addressed the issue of Fair Labor Standards Act [[259]](#footnote-260)259 (FLSA) retaliation in Hagan. [[260]](#footnote-261)260 Mr. Hagan worked as a supervisor of field technicians. [[261]](#footnote-262)261 In December 2004, his employer changed its work schedule to seven twelve-hour workdays in each two-week pay period. [[262]](#footnote-263)262 When Hagan questioned the wisdom of invoking a system that would reduce the amount of his technicians' overtime, he was told that the company needed to eliminate the inefficiency that persisted under its old scheduling system. [[263]](#footnote-264)263

Hagan's technicians later questioned him regarding the impact of the new schedule on the amount of overtime they could receive. [[264]](#footnote-265)264 He indicated that the new schedule would likely reduce the amount of overtime but encouraged them to present their questions to the human resources (HR) department. [[265]](#footnote-266)265 Within a few days, the company fired Hagan for "insubordination." [[266]](#footnote-267)266 Management was upset over Hagan's communications with the technicians about the new schedule and the corresponding impact on their morale because of their discontent over losing overtime pay. [[267]](#footnote-268)267

**[\*1123]**

Hagan sued under the FLSA, asserting that the company retaliated for his engaging in statutorily protected activity. [[268]](#footnote-269)268 He claimed that the employer retaliated against him for his personal objections to the schedule change and for passing along his technicians' question regarding the legality of the change to the HR department. [[269]](#footnote-270)269 This claim presented the Fifth Circuit with an issue of first impression: whether the employee's behavior was equivalent to filing a complaint under the FLSA's statutory scheme. [[270]](#footnote-271)270

The Hagan court began by noting that "informal complaints" can, under certain circumstances, constitute protected activity under the FLSA. [[271]](#footnote-272)271 It also noted that several cases require such complaints to concern "some violation of the law." [[272]](#footnote-273)272 Because Hagan did not believe that the employer's proposed schedule change was illegal and because he had raised his objections only because of the possibility that technicians might receive less overtime, the court concluded that his personal objections to the schedule change did not constitute protected activity under the FLSA. [[273]](#footnote-274)273

The court then turned to the "stepping outside the role" doctrine and asked whether Hagan had engaged in protected activity by passing along to the HR manager the technicians' concerns about the schedule change. [[274]](#footnote-275)274 The court concluded that Hagan's conduct did not equate to personal advocacy on behalf of statutory rights for the technicians. [[275]](#footnote-276)275 On this basis, the court concluded that the district court had correctly granted a motion for judgment as a matter of law in favor of the employer. [[276]](#footnote-277)276

B. Moran v. Ceiling Fans Direct, Inc.

In Moran, the Fifth Circuit considered whether employees pursuing claims of unpaid overtime and retaliation under the FLSA could be required to arbitrate their claims based on an arbitration clause supposedly adopted by the employer in a notice announcing the establishment of a new "dispute resolution program." [[277]](#footnote-278)277 The Fifth Circuit found that there was no valid agreement to **[\*1124]** arbitrate. [[278]](#footnote-279)278 The employer did not explain the new policy, did not mention that continued employment would be deemed as acceptance, and was aware that many employees did not take a copy of the new policy. [[279]](#footnote-280)279 Although the employer issued the new employee handbook, which contained an acknowledgement form, the employer did not require the employees to sign it while simultaneously requiring the employees to sign a form concerning the company's policy on drug and alcohol use in the workplace. [[280]](#footnote-281)280 On this basis, Moran held that there was no valid agreement to arbitrate the claims. [[281]](#footnote-282)281

VIII. National Labor Relations Act

A. United States Supreme Court Decision: Davenport v. Washington Education Ass'n

In Davenport, the Supreme Court considered the constitutional contours of permissible action by a state agency in seeking to regulate the actions of public sector unions in their interactions with non-union members. [[282]](#footnote-283)282 The Court held that the Washington Education Association could require the public sector union to receive an affirmative authorization from a non-union member before spending fees for election purposes without violating the First Amendment rights of the union. [[283]](#footnote-284)283

B. Fifth Circuit Decisions

1. NLRB v. Allied Aviation Fueling of Dallas LP

Allied Aviation involved the question of the impact of a forgery on a grievance filing. [[284]](#footnote-285)284 The company and the union had in place a collective bargaining agreement (CBA) that required the filing of any grievance within seven days of any alleged violation of the agreement. [[285]](#footnote-286)285 Sanford, the union representative for a particular maintenance unit of the company, became concerned that the employer might be outsourcing some of its maintenance work in violation of the CBA. [[286]](#footnote-287)286 With union authorization, he sought to file grievances on behalf of two union members in the unit who would have been entitled to overtime if the work had not been outsourced. [[287]](#footnote-288)287 He prepared the **[\*1125]** appropriate paperwork but could not get the signatures of both grievants in time. [[288]](#footnote-289)288 For that reason, he forged the name of one of the grievants, Thompson, on a grievance form and filed it on behalf of that grievant. [[289]](#footnote-290)289 Learning of the forgery the following week, Thompson protested this action by Sanford and requested that the grievance be withdrawn. [[290]](#footnote-291)290 Sanford did so and explained to the company's maintenance manager that he had forged the Thompson grievance form, and that it would be withdrawn. [[291]](#footnote-292)291 Within one month, Sanford was fired for engaging in dishonesty, falsifying company documents, and committing fraud. [[292]](#footnote-293)292

The National Labor Relations Board (NLRB) concluded that the termination violated chapter seven of the National Labor Relations Act (NLRA). [[293]](#footnote-294)293 The Fifth Circuit, thus, considered whether the NLRB's order should be enforced. [[294]](#footnote-295)294 The company challenged the NLRB determination on the basis that its actions against Sanford were justified because he sought a personal benefit by committing the forgery. [[295]](#footnote-296)295 But the court held that it was permissible for a union member to "forge" a co-worker's signature to an NLRA grievance so long as the forger was acting to protect the co-worker's interest in the absence of any pecuniary interest of his own. [[296]](#footnote-297)296 In so holding, the court sought to balance the right of an employee to be protected from disciplinary action when engaging in protected union activity [[297]](#footnote-298)297 and the right of an employer not to have to tolerate "flagrant conduct of an employee" who purports to engage in protected union activity. [[298]](#footnote-299)298 In his view, Sanford was seeking to protect a union member's right to overtime pay, not pursuing his own pecuniary interest, when he forged the document in question. [[299]](#footnote-300)299 Thus, the court upheld the NLRB's petition for enforcement. [[300]](#footnote-301)300

2. Strand Theatre of Shreveport Corp. v. NLRB

Strand Theatre produces theatrical plays. [[301]](#footnote-302)301 It began using stagehand labor referred by the Stage Employees Local 298 and over a period of time, **[\*1126]** entered into successive three-year agreements with the union. [[302]](#footnote-303)302 The agreements recognized the union as the "exclusive representative of all employees performing work covered by this agreement." [[303]](#footnote-304)303 Strand and the union then entered into a series of successive one-year agreements from 2002 through August 2004. [[304]](#footnote-305)304 Negotiations for a new agreement failed in 2004, and Strand Theatre announced it would not sign any other agreements with the union because it had determined that a nonunion labor supplier could provide Strand with a significantly cheaper labor source. [[305]](#footnote-306)305 Strand Theatre, therefore, began to hire nonunion staff for its theatre jobs. [[306]](#footnote-307)306

The union challenged the actions as a violation of the NLRA, and the challenge was administratively upheld. [[307]](#footnote-308)307 In the appeal that followed, the Fifth Circuit focused on § 9(a) of the NLRA: [[308]](#footnote-309)308 "[A] non-construction employer must continue bargaining with a union after a 9(a) agreement expires because the union is entitled to a continuing presumption of majority status." [[309]](#footnote-310)309 Determining under applicable standards [[310]](#footnote-311)310 that Strand Theatre had made no effort to show a loss of majority support for the union, the court upheld the NLRB's determination of an NLRA violation and ordered enforcement of the NLRB's petition. [[311]](#footnote-312)311

3. California Gas Transport, Inc. v. NLRB

California Gas Transport operated a trucking operation that delivered propane gas from terminals in Arizona and Texas to distribution facilities in Mexico. [[312]](#footnote-313)312 The drivers who worked at these facilities became disenchanted with their wages and working conditions and took steps to organize themselves into a union through the Teamsters. [[313]](#footnote-314)313 The company responded by taking various actions at its Arizona, Texas, and Mexico facilities. [[314]](#footnote-315)314 Ultimately, the company was accused of violating the NLRA by "interrogating employees, promising them pay raises, threatening discharge and other unspecified reprisals, creating the impression of surveillance, soliciting resignations, **[\*1127]** terminating several employees, giving negative employment references for terminated employees, failing and refusing to bargain with the union, [and] engaging in direct- dealing." [[315]](#footnote-316)315

After the NLRB determined that California Gas had violated the NLRA, the company challenged the part of the NLRB's order that penalized it for actions taken in Mexico, which it claimed were outside the purview of the NLRB. [[316]](#footnote-317)316 The Fifth Circuit determined that it did not need to reach the question of NLRB authority to address the company's actions allegedly taken in Mexico because there was ample evidence to enforce the NLRB's order based upon what occurred at the company's facilities in Arizona and Texas. [[317]](#footnote-318)317

4. Sara Lee Bakery Group, Inc. v. NLRB

Sara Lee Bakery Group involved issues pertaining to the appropriate scope of, and responses to, administrative document requests. [[318]](#footnote-319)318 Sara Lee Bakery Group maintained several facilities, including two in Kentucky (Owensboro and London) that were about 220 miles apart. [[319]](#footnote-320)319 The Owensboro facility used transport drivers who were members of a local Teamsters collective bargaining unit that was covered by a CBA, and the London facility used transport drivers who were employed by an unaffiliated delivery services company, Worldwide. [[320]](#footnote-321)320 Through a series of procedures and scheduling actions, the Sara Lee engaged in "cross-docking" [[321]](#footnote-322)321 and "backhauling." [[322]](#footnote-323)322 The union complained about these actions, claiming that they were depriving union drivers of work and pay for hauling company products. [[323]](#footnote-324)323 The union also complained about the company's practice of using drivers from the unaffiliated delivery services company as a means of depriving union drivers from getting work. [[324]](#footnote-325)324 Both actions were alleged to violate the CBA. [[325]](#footnote-326)325

The union ultimately filed an unfair labor practice charge with the NLRB, complaining in part about the company's failure to provide certain requested **[\*1128]** information concerning its practices. [[326]](#footnote-327)326 The NLRB upheld the union's challenge and found the company in violation of the NLRA. [[327]](#footnote-328)327

Responding to the company's challenge to the NLRB's order, the Fifth Circuit first considered the NLRB's claim that the company had not contested certain findings. [[328]](#footnote-329)328 The court deemed that the NLRB was entitled to summary enforcement of those matters that the company "wholly failed to contest." [[329]](#footnote-330)329 The court then turned to the company's challenge that certain information it had been requested to produce was unavailable. [[330]](#footnote-331)330 Recognizing that the company could not be held liable for "failing to produce information it [did] not have," [[331]](#footnote-332)331 the court nevertheless upheld the administrative law judge's determination that the company had "utterly failed to conduct a good faith inquiry" to determine what information was available from other sources. [[332]](#footnote-333)332

As for the final challenge (the union's request for information pertaining to the company's costs and contract with Worldwide), the court agreed with the company that (1) the union had failed to articulate a legitimate basis for relevancy of the documents because the information requested was not bargaining unit data and (2) the NLRB had failed to establish how the contracting costs and the contract between the company and Worldwide were logically connected to a legitimate unionpurpose. [[333]](#footnote-334)333 It therefore upheld the company's challenge to the order on this point. [[334]](#footnote-335)334

IX. Sarbanes Oxley Whistleblower Claims [[335]](#footnote-336)335

A. Allen v. Administrative Review Board

In Allen, employers of a funeral and cemetery services company expressed concerns to their supervisors about alleged malfunctions in company computers that seemed to be causing customers to be overcharged. [[336]](#footnote-337)336 The employees did not consider the company to be intentionally engaging in **[\*1129]** improper conduct but instead only thought that the company was taking too long to address known and remediable problems with customer accounts. [[337]](#footnote-338)337 These employees were disciplined and eventually made subject to a "reduction in force." [[338]](#footnote-339)338 They duly filed whistleblower claims under Sarbanes Oxley (SOX). [[339]](#footnote-340)339

In a SOX action, the burdens of proof in a whistleblower claim are statutorily established. [[340]](#footnote-341)340 As highlighted by the Allen court, the whistle-blowing employee must prove by a preponderance of the evidence that (1) she engaged in protected activity, (2) the employer knew that she engaged in the protected activity, (3) she suffered an unfavorable personnel action, and (4) the protected activity was a contributing factor in the unfavorable action. [[341]](#footnote-342)341 Once the employee establishes these elements, the employer can avoid SOX liability by proving through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the allegedly protected behavior. [[342]](#footnote-343)342

The administrative law judge and the administrative review board both determined that the petitioners "did not engage in protected activity." [[343]](#footnote-344)343 They stated, and the Fifth Circuit agreed, that the complaint had to relate specifically to one of the six enumerated categories of 18 U.S.C. § 1514A. [[344]](#footnote-345)344 The Fifth Circuit further emphasized that when an employee asserts a SOX whistleblower violation, the court scrutinizes the employee's "reasonable belief" of such a violation by both a subjective and an objective standard-the court questions whether the knowledge available to a reasonable person in the same circumstances would lead to the belief, even if mistaken. [[345]](#footnote-346)345 The court ultimately concluded that there was substantial evidence to support the administrative decisions that the petitioners did not believe that the employer **[\*1130]** acted with "a mental state embracing an intent to deceive, manipulate or defraud," and that the employer was attempting in good faith to correct the problems brought to its attention by the petitioners. [[346]](#footnote-347)346

B. Getman v. Administrative Review Board

While working as a research analyst for Southwest Securities, Inc., Margot Getman refused to recommend a high rating for a stock on which she reported. [[347]](#footnote-348)347 Her supervisors questioned this decision in a meeting, and she informed them that while they could recommend a higher rating, she would not sign any such report. [[348]](#footnote-349)348 The firm later terminated her employment, and she then filed a whistleblower complaint with OSHA pursuant to SOX. [[349]](#footnote-350)349 Ms. Getman's claim was then administratively rejected on the basis that she had not engaged in a protected activity. [[350]](#footnote-351)350

The Fifth Circuit evaluated Ms. Getman's appeal and determined that at the meeting in question, she did not inform the ratings committee that she believed changing the rating would violate any securities law, and she conceded that no one on the committee told her to change the recommendation. [[351]](#footnote-352)351 On this basis, the court concluded that the "unspecified refusal" by her was not sufficient to "provide information" to one of her supervisors of a potential violation of SOX. [[352]](#footnote-353)352 Instead, she had failed to carry her concern beyond a mere normal disagreement over a stock's rating by communicating that the employer's conduct constituted a law violation. [[353]](#footnote-354)353 The Fifth Circuit, therefore, affirmed the rejection of her whistleblower claim. [[354]](#footnote-355)354

X. Worker Adjustment and Retraining Notification Act: Plasticsource Workers Committee v. Coburn

The Worker Adjustment and Retraining Notification Act [[355]](#footnote-356)355 (WARN Act) requires employers to provide affected employees at least sixty days notice of a plant closing or a mass layoff. [[356]](#footnote-357)356 The failure of the employer to issue such notice entitles the affected employees to pursue recovery of limited damages **[\*1131]** equivalent to back pay accruing during the notice period, together with other costs and attorney's fees. [[357]](#footnote-358)357

In Coburn, Plasticsource closed its plant in El Paso without notice, thereby displacing sixty-four employees, who later formed the Plasticsource Workers Committee. [[358]](#footnote-359)358 The committee then sued the company and David Coburn for violations of the WARN Act. The employees asserted that Mr. Corburn, an individual with unknown affiliation to the company, should be individually liable under a theory of alter ego. [[359]](#footnote-360)359

After a default judgment was entered against him, Mr. Coburn asked the Fifth Circuit to resolve whether a natural person could be liable for statutory damages under the WARN Act. [[360]](#footnote-361)360 The court noted that it previously had ruled that a natural person could be indirectly liable in Louisiana for statutory WARN damages under an alter ego theory. [[361]](#footnote-362)361 Similarly, the court considered Texas law, which recognizes a theory of alter ego liability under the well-known standards established by the Texas Supreme Court in Castleberry v. Branscum. [[362]](#footnote-363)362 Therefore, based on this state law authority, the court rejected Coburn's contention that he, individually, could never be held liable for WARN violations. [[363]](#footnote-364)363

XI. Occupational Safety and Health Act: Trinity Marine Products, Inc. v. Chao

In Trinity Marine Products, the Fifth Circuit considered a question of first impression in its Occupational Safety and Health Administration (OSHA) jurisprudence: whether an employer has a constitutional right to a contempt hearing prior to an OSHA search. [[364]](#footnote-365)364

At the time of the search in question, OSHA officers came to the Trinity Marine's facility to conduct an inspection of its workplace pursuant to an administrative search warrant. [[365]](#footnote-366)365 Trinity Marine asked OSHA's compliance inspectors for the opportunity to review copies of the warrant's supporting documentation, but the compliance inspectors declined. [[366]](#footnote-367)366 Trinity Marine **[\*1132]** officials then refused entry. [[367]](#footnote-368)367 The inspection occurred only after federal marshals were dispatched to assist the compliance inspectors in enforcing the search warrant. [[368]](#footnote-369)368

Following inspection, OSHA issued citations. [[369]](#footnote-370)369 The citations were contested by Trinity Marine before an administrative law judge who rejected Trinity's arguments. [[370]](#footnote-371)370 The Occupation Safety and Health Review Commission refused to review the judge's decision. [[371]](#footnote-372)371 Trinity then challenged, in federal court, the search as violating the Fourth and Fifth Amendments to the U.S. Constitution by claiming that at the time of the search, OSHA allegedly threatened the arrest of Trinity personnel who interfered with the search instead of seeking civil contempt. [[372]](#footnote-373)372

The Fifth Circuit held that "there is no constitutional right to a pre-execution contempt hearing and that administrative warrants, like criminal warrants, can be executed by means of reasonable force." [[373]](#footnote-374)373 Referring to the leading Supreme Court decision on administrative proceedings, Marshall v. Barlow's, Inc., the Fifth Circuit opined that any violation of constitutional rights, if any, could be vindicated by means of a Bivens suit. [[374]](#footnote-375)374

XII. Employment Decisions Interpreting Texas Law

A. Navigant Consulting, Inc. v. Wilkinson

In Navigant Consulting, the Fifth Circuit addressed significant Texas law issues pertaining to claims of misappropriation of trade secrets and breaches of fiduciary duty by employees in the workplace. [[375]](#footnote-376)375 Navigant is a national consulting company and two of its employees, Wilkinson and Taulman, managed its Dallas claims administration practice (Claims Practice). [[376]](#footnote-377)376 Wilkinson and Taulman were at-will employees but had signed agreements containing covenants not to compete, not to solicit business or employees, and not to disclose trade secrets. [[377]](#footnote-378)377

**[\*1133]**

Unbeknownst to Navigant Consulting, another company seeking to purchase the Claims Practice contacted the employees. [[378]](#footnote-379)378 Without disclosing this inquiry to Navigant Consulting, the employees drafted and sent to the prospective purchaser a proposal that, among other things, disclosed significant trade secrets (e.g., revenue projections, margin rates, and current customer engagements) and called for the purchase to be handled through a "management-owned corporation" actually owned by the two employees. [[379]](#footnote-380)379 This discussion ultimately ended without result, and the employees then endeavored to sell the Claims Practice to other Navigant Consulting competitors. [[380]](#footnote-381)380 Navigant Consulting eventually learned of these efforts and confronted the two employees about their activities. [[381]](#footnote-382)381 The employees responded by proposing to "take the 'Dallas Claims Practice' off Navigant's hands" in exchange for taking over responsibility for the lease that they had just signed on behalf of Navigant in a Dallas office building. [[382]](#footnote-383)382 Navigant rejected this proposal and the employees resigned two days later. [[383]](#footnote-384)383 They then accepted offers of employment with one of Navigant's competitors with whom they had earlier negotiated a potential sale of the Claims Practice. [[384]](#footnote-385)384

Navigant Consulting sued the two employees within a few weeks after their resignations, claiming breach of fiduciary duty, breach of contract, and misappropriation of trade secrets. [[385]](#footnote-386)385 Navigant recovered judgment against the employees following trial. [[386]](#footnote-387)386

Turning first to the breach of fiduciary duty claim, the Fifth Circuit identified the elements of such a claim and noted that two types of fiduciary relationships exist under Texas law-"formal" and "informal." [[387]](#footnote-388)387 Recognizing that "[a]n informal fiduciary relationship may arise between an employee and employer," the court noted that such a fiduciary relationship existed, a point not contested by the employees. [[388]](#footnote-389)388 It further recognized that the Texas Supreme Court has never adopted one comprehensive definition of the term "fiduciary" but gleaned from its decisions a duty of good faith and fair dealing, **[\*1134]** with the employee primarily having "a duty to act primarily for the benefit of the employer in matters connected with his agency." [[389]](#footnote-390)389

The Navigant Consulting court correspondingly noted that defining the scope of fiduciary obligations had to be tempered with "society's legitimate interest in encouraging competition," and that an at-will employee has the right to "plan to go into competition with his employer" and can "take active steps to do so while still employed." [[390]](#footnote-391)390 Nevertheless, the court further recognized that one's right to make preparations for a future competing business venture was limited by the employee's obligation not to appropriate trade secrets, solicit customers, carry away certain information (such as customer lists), or use company funds for personal gain. [[391]](#footnote-392)391 Thus, the Court ruled that the evidence presented on breach of fiduciary duty supported the jury's findings infavor of Navigant Consulting. [[392]](#footnote-393)392

The court further held that Navigant Consulting's breach of contract claim was valid based upon the employees' actions in disclosing confidential company information to prospective purchasers. [[393]](#footnote-394)393 It therefore affirmed all actual and punitive damages awarded against the employees. [[394]](#footnote-395)394

B. ***Kern*** v. Sitel Corp.

***Kern*** v. Sitel Corp. involved an employment compensation dispute under Texas law. [[395]](#footnote-396)395 Mr. ***Kern*** was hired by Sitel Corp. as a vice-president and was compensated by a salary of $ 110,000 and performance-based incentives. [[396]](#footnote-397)396 The company's Sales Compensation Plan provided incentive compensation for "new . . . business sold to new accounts" and for "new . . . [business] sold to existing accounts," on the basis of services "invoiced to clients during the fiscal year." [[397]](#footnote-398)397 The amount of the incentive payment was based upon budgeted revenue such that reaching targeted revenue entitled an employee to 100% of the incentive payment and exceeding the target revenue entitled the employee to receive up to 250% of base salary (if sales were twice the target revenue). [[398]](#footnote-399)398

With an $ 8 million target revenue goal in 2004, Mr. ***Kern*** generated total revenue of more than $ 16 million, principally from sales to one client. [[399]](#footnote-400)399 By achieving sales of more than twice his target revenue for the year, Mr. ***Kern*** **[\*1135]** believed he was entitled to an incentive payment of 250% of his base salary. [[400]](#footnote-401)400 The employer disagreed, however, based upon its interpretation of the compensation plan, and capped Mr. ***Kern***'s incentive payment at $ 150,000. [[401]](#footnote-402)401 The company took the position that Paragraph 6.0 of the plan empowered it to interpret the plan, and that Paragraph 20.0 of the plan capped any incentive payment "for one account" at $ 150,000. [[402]](#footnote-403)402 Mr. ***Kern*** sued to recover the $ 125,000 of additional incentive pay to which he thought he was entitled, contending that Paragraph 20.0 only applied on a per transaction basis, not per customer, and that because this paragraph was unambiguous, there was no need for interpretation under Paragraph 6.0. [[403]](#footnote-404)403

The Fifth Circuit agreed with Mr. ***Kern*** that Paragraph 20.0 was not ambiguous, and that his interpretation was "the only reasonable interpretation." [[404]](#footnote-405)404 It rejected his corollary argument, however, that a lack of ambiguity in Paragraph 20.0 eliminated the need to apply Paragraph 6.0. [[405]](#footnote-406)405 Rejecting Mr. ***Kern***'s invocation of the Texas Supreme Court's decision in Monsanto v. Boustany as inapplicable because it applied Delaware law, not Texas law, the court could find no Texas cases on point, and thus turned to its prior decision in Marsh v. Greyhound Lines, Inc. [[406]](#footnote-407)406 The court decided that Marsh allows an employer to interpret a plan so long as the employer has acted in good faith. [[407]](#footnote-408)407 Concluding that Sitel Corp. had acted in good faith under the terms of the plan, the court upheld summary judgment in its favor. [[408]](#footnote-409)408

C. Amigo Broadcasting, LP v. Spanish Broadcasting System, Inc.

The Fifth Circuit also took up important questions of Texas law in Amigo Broadcasting. [[409]](#footnote-410)409 The termination of an employment relationship between Amigo Broadcasting and two of its on-air radio personalities, who were broadcasting at its station in Austin, triggered a lawsuit. [[410]](#footnote-411)410 The broadcasters **[\*1136]** had each signed employment agreements with Amigo Broadcasting that included non- compete agreements. [[411]](#footnote-412)411 When Amigo Broadcasting learned that the two broadcasters had negotiated and later signed employment agreements with Spanish Broadcasting Systems and had subsequently stopped coming to work, Amigo Broadcasting accused them of job abandonment. [[412]](#footnote-413)412 They sued the broadcasters for breach of contract and sued the other radio station for tortious interference. [[413]](#footnote-414)413 The district court granted the defendants' motion for judgment as a matter of law at the conclusion of Amigo Broadcasting's presentation of its case-in-chief. [[414]](#footnote-415)414

On appeal, the Fifth Circuit first considered the breach of contract claim. [[415]](#footnote-416)415 The court concluded that the former employees' claim that they were employees at-will was "unpersuasive" and that Texas law recognized an exception to at-will employment when there exists "an express agreement to the contrary." [[416]](#footnote-417)416 The court ruled that the existing agreements limited the ways in which the employees' employment could be terminated and also limited the circumstances under which either party to the agreement could terminate the agreement. [[417]](#footnote-418)417 On this basis, the court concluded that Amigo Broadcasting produced sufficient evidence to present a jury question on the breach of contract issue. [[418]](#footnote-419)418 Therefore, the court reversed and remanded that part of the judgment. [[419]](#footnote-420)419

Turning to the claim of tortious interference, the court commenced its analysis by stating the four-part test applicable to such claims: "(1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred." [[420]](#footnote-421)420 The court also opined that the burden on Amigo Broadcasting was not to demonstrate "intent to injure" but rather only that the tortfeasor (1) intended or desired to cause the consequences of its actions or (2) believed that the consequences were substantially certain to result. [[421]](#footnote-422)421 Additionally, Amigo Broadcasting needed to show that the tortfeasor had (1) actual knowledge of the contractual relationship in question or (2) knowledge of facts that a reasonable person would believe indicate the existence of a contractual relationship. [[422]](#footnote-423)422 **[\*1137]** Reviewing the evidence, the court found that there was sufficient evidence for a jury to conclude that Spanish Broadcasting Systems' actions constituted willful and intentional acts of interference and that its actions were a proximate cause of damage to Amigo Broadcasting. [[423]](#footnote-424)423 Therefore, the court reversed and remanded the judgment on the tortious interference claim as well. [[424]](#footnote-425)424

XIII. Employment Arbitration [[425]](#footnote-426)425

The U.S. Supreme Court issued two significant decisions involving the application of the Federal Arbitration Act [[426]](#footnote-427)426 (FAA). Given the rise in the number of employment disputes that are now routinely arbitrated, these refinements to the FAA will have an impact on the manner in which employment disputes are arbitrated.

A. Supreme Court Decisions

1. Hall Street Associates, L.L.C. v. Mattel, Inc. [[427]](#footnote-428)427

The FAA governs a court's standard of review of an arbitration award. [[428]](#footnote-429)428 The statutory command restricts vacatur of an arbitrator's award to the following circumstances:

(1) [W]here the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. [[429]](#footnote-430)429

**[\*1138]** The statutory command of the FAA restricts modification of an arbitrator's award to the following circumstances:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. [[430]](#footnote-431)430

The Fifth Circuit had recently held, most notably in Hughes Training Inc. v. Cook, that despite the statutory command of the FAA, the parties to an arbitration agreement could establish a separate standard of review for an arbitration award, exalting the preeminence of the parties' private efforts to negotiate an alternative means of resolving disputes. [[431]](#footnote-432)431 In Cook, for example, a case involving a claim of unlawful employment discrimination, the Fifth Circuit held that the parties could legitimately incorporate the following language into their arbitration agreement:

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, and to vacate an arbitration award. However, in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury. [[432]](#footnote-433)432

The Fifth Circuit therefore essentially endorsed importing the Federal Rule of Civil Procedure's "clearly erroneous" standard of review into the arbitration process. [[433]](#footnote-434)433

Hall Street Associates, L.L.C. v. Mattel, Inc. presented a situation in which the parties had similarly entered into a written arbitration agreement that contained a "contractual standard of review" of the arbitrator's award, authorizing a reviewing court to vacate, modify, or correct any award "(i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." [[434]](#footnote-435)434 The district court where the original dispute was filed endorsed the contractual **[\*1139]** standard of review. [[435]](#footnote-436)435 Indeed, it encouraged the parties to arbitrate and then approved their resulting agreement. [[436]](#footnote-437)436

In Hall Street, the Supreme Court completely rejected the concept of parties rewriting the standards of review created by the FAA. [[437]](#footnote-438)437 The Court held that no action could be taken by a party to an arbitration agreement that diminishes in any respect the standard by which a reviewing court can evaluate an arbitration award. [[438]](#footnote-439)438

2. Preston v. Ferrer

As framed by Justice Ginsburg's majority opinion, the arbitration question presented by Preston v. Ferrer was whether the FAA overrides "not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency." [[439]](#footnote-440)439 The case involved a claim arising from a dispute between a television judge, Judge Alex Ferrer, and his attorney-agent, Arnold Preston. [[440]](#footnote-441)440 Mr. Preston claimed that Mr. Ferrer owed him fees for services rendered under an agreement containing an arbitration clause. [[441]](#footnote-442)441 When Mr. Preston sought to arbitrate this dispute pursuant to the terms of the agreement, Mr. Ferrer petitioned the California labor commissioner to determine that the agreement was "invalid and unenforceable under California's Talent Agencies Act" on the basis that Mr. Preston had acted as a talent agent without proper licensing. [[442]](#footnote-443)442 The matter eventually moved to the California courts, which recognized the "exclusive jurisdiction" vested in the labor commissioner for disputes like this one and held that arbitration would be denied unless the labor commissioner determined she was without jurisdiction to hear the dispute. [[443]](#footnote-444)443

Declining to decide whether the FAA preempts the Talent Agencies Act in total, Preston nevertheless held, in keeping with some of its precedent, that the applicability of the FAA dictated that it would supersede any contrary state law regarding primary jurisdiction in evaluation of the admittedly arbitrable claim. [[444]](#footnote-445)444 The court specifically declined to interpose an "exhaustion of remedies" requirement upon the arbitration process. [[445]](#footnote-446)445

**[\*1140]**

B. Fifth Circuit Decision: Lester v. Advanced Environmental Recycling Technologies, Inc.

In a similar vein, the Fifth Circuit decided a case involving the arbitrability of an employment-related dispute. [[446]](#footnote-447)446 In Lester, the court held that an injured employee could be required to arbitrate his entitlement to benefits pursuant to a benefits program established by a non-subscriber to workers' compensation. [[447]](#footnote-448)447 Addressing the employee's contention that the Texas Arbitration Act (TAA) barred compelling arbitration of his personal injury claims because of the wording of § 171.002(a)(3) and (c), the court held that Texas law was pre-empted by the FAA. [[448]](#footnote-449)448

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**End of Document**

1. 1 This Article covers cases decided by the United States Supreme Court between June 1, 2007, and the end of the October 2007-08 Term, and by the United States Court of Appeals for the Fifth Circuit and Texas courts between June 1, 2007, and May 31, 2008. [↑](#footnote-ref-2)
2. 2 A Texas court of appeals also issued a significant employment decision interpreting the disabilities discrimination component of the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. §§ 21.001-.556 (Vernon 2006). See infra Part IV.B. [↑](#footnote-ref-3)
3. 3 29 U.S.C. §§ 621-634 (2000 & Supp. V 2005). [↑](#footnote-ref-4)
4. 4 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. V 2005). [↑](#footnote-ref-5)
5. 5 Id. § 1981 (2000). [↑](#footnote-ref-6)
6. 6 Id. §§ 12101-12213. [↑](#footnote-ref-7)
7. 7 29 U.S.C. §§ 2601-2654 (2000 & Supp. V 2005). [↑](#footnote-ref-8)
8. 8 Id. §§ 1101-1461. [↑](#footnote-ref-9)
9. 9 Id. §§ 201-219. [↑](#footnote-ref-10)
10. 10 Id. §§ 151-169. [↑](#footnote-ref-11)
11. 11 18 U.S.C. § 1514A (2006). [↑](#footnote-ref-12)
12. 12 29 U.S.C. §§ 2101-2109 (2000 & Supp. V 2005). [↑](#footnote-ref-13)
13. 13 Id. §§ 651-678. [↑](#footnote-ref-14)
14. 14 9 U.S.C. §§ 1-16, 201-208, 301-207 (2006). [↑](#footnote-ref-15)
15. 15 Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1153 (2008). [↑](#footnote-ref-16)
16. 16 29 U.S.C. § 626(d). In pointing out this statutory requirement, the Federal Express Court also noted that despite many similarities between the ADEA and other statutes proscribing employment discrimination, each had its own set of provisions such that a procedure applicable to one statute would not necessarily apply to a procedure applicable to another statute. Fed. Express, 128 S. Ct. at 1152. "While there may be areas of common definition, employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. This is so even if the EEOC forms and the same definition of charge apply in more than one type of discrimination case." Id. at 1153 (citation omitted). Under the ADEA, the claimant must have filed the charge with the EEOC at least sixty days prior to filing a lawsuit in federal court. § 626(d). [↑](#footnote-ref-17)
17. 17 Fed. Express, 128 S. Ct. at 1153. [↑](#footnote-ref-18)
18. 18 Id. [↑](#footnote-ref-19)
19. 19 Id. at 1160. [↑](#footnote-ref-20)
20. 20 Id. at 1157-58. [↑](#footnote-ref-21)
21. 21 Id. at 1158. [↑](#footnote-ref-22)
22. 22 Id. [↑](#footnote-ref-23)
23. 23 Id. at 1159-60. [↑](#footnote-ref-24)
24. 24 Gomez-Perez v. Potter, 128 S. Ct. 1931, 1935 (2008). [↑](#footnote-ref-25)
25. 25 Id. The ADEA has a federal sector provision covering employment decisions affecting federal employees. See 29 U.S.C. § 633a(a) (Supp. V 2005) ("All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age."). [↑](#footnote-ref-26)
26. 26 Gomez-Perez, 128 S. Ct. at 1936. The ADEA specifically proscribes retaliation by private employers. See 29 U.S.C. § 623(d) (2000). [↑](#footnote-ref-27)
27. 27 Gomez-Perez, 128 S. Ct. at 1936. [↑](#footnote-ref-28)
28. 28 See id. at 1936-37 (discussing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (holding right to bring retaliation claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000 & Supp. V 2005)); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (holding right to bring retaliation claim under 42 U.S.C. § 1982)). Gomez-Perez was decided the same day as the Court's opinion in CBOCS West, Inc. v. Humphries, discussed infra Part III, in which the Court upheld the right of an aggrieved employee to bring a retaliation claim against an employer under 42 U.S.C. § 1981 (2000) despite the absence of an explicit anti- retaliation prohibition in that statute. See CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008). [↑](#footnote-ref-29)
29. 29 Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361 (2008). [↑](#footnote-ref-30)
30. 30 Id. [↑](#footnote-ref-31)
31. 31 Id. [↑](#footnote-ref-32)
32. 32 Id. [↑](#footnote-ref-33)
33. 33 Id. [↑](#footnote-ref-34)
34. 34 Id. [↑](#footnote-ref-35)
35. 35 Id. at 2369. In one of the more unusual lineups of Justices voting in an employment case, Justices Breyer, Stevens, Thomas, and Souter joined Chief Justice Roberts in the majority, with Justices Kennedy, Scalia, Alito, and Ginsburg dissenting. Id. at 2364. [↑](#footnote-ref-36)
36. 36 Id. at 2369. [↑](#footnote-ref-37)
37. 37 Id. at 2366 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). [↑](#footnote-ref-38)
38. 38 Id. at 2366-67. [↑](#footnote-ref-39)
39. 39 Id. at 2367. [↑](#footnote-ref-40)
40. 40 Id. at 2367-71 (discussing Hazen Paper Co., 507 U.S. 604) [↑](#footnote-ref-41)
41. 41 Id. at 2367 (noting that the ADEA permits an employer to condition pension eligibility upon age (citing 29 U.S.C. § 623(l)(1)(A)(i) (2000))). [↑](#footnote-ref-42)
42. 42 Id. at 2368. The dissent urged a ruling in favor of the employee, specifically characterizing as "a straightforward act of discrimination on the basis of age" the differential treatment effected by the Kentucky Plan between a young, disabled police officer without the requisite years of service and an older police officer (like the claimant) who had already passed the required eligibility requirements for pension benefits. Id. at 2372 (Kennedy, J., dissenting). [↑](#footnote-ref-43)
43. 43 Smith v. City of Jackson, 544 U.S. 228, 228 (2005). [↑](#footnote-ref-44)
44. 44 Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2398 (2008). [↑](#footnote-ref-45)
45. 45 Id. at 2401-04 (taking into account the congressional response to its decision in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), with the passage of the Older Worker Benefits Protection Act, Pub. L. No. 102-166, tit. I, 105 Stat. 1079 (1991), which among other things amended 29 U.S.C. § 623(f)(1) by inserting the phrase "otherwise prohibited" as part of the preface to the listing of factors, such as RFOA). [↑](#footnote-ref-46)
46. 46 Id. at 2398. [↑](#footnote-ref-47)
47. 47 During the reporting period, the Fifth Circuit issued only one published decision applying Title VII of the 1964 Civil Rights Act (Title VII). [↑](#footnote-ref-48)
48. 48 Alvarado v. Texas Rangers, 492 F.3d 605, 609 (5th Cir. July 2007). [↑](#footnote-ref-49)
49. 49 Id. [↑](#footnote-ref-50)
50. 50 Id. at 610. Ms. Alvarado was one of 146 applicants seeking one of ten available positions. Id. at 609. [↑](#footnote-ref-51)
51. 51 Id. at 611 (citing Willis v. Coca-Cola Enters., Inc., 445 F.3d 413, 420 (5th Cir. 2006)) (noting that Ms. Alvarado was required to show that she was a member of a protected class, that she was qualified for the position she sought, that she suffered an adverse employment action, and that others similarly situated who were outside the protected class were treated more favorably). [↑](#footnote-ref-52)
52. 52 Id. at 612-18. [↑](#footnote-ref-53)
53. 53 Id. at 610. [↑](#footnote-ref-54)
54. 54 Id. [↑](#footnote-ref-55)
55. 55 Id. at 612. [↑](#footnote-ref-56)
56. 56 Id. (citing Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999); Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir. 1996); Click v. Copeland, 970 F.2d 106 (5th Cir. 1992)). [↑](#footnote-ref-57)
57. 57 Id. at 613. [↑](#footnote-ref-58)
58. 58 Id. at 614 (citing Sharp, 164 F.3d at 933). [↑](#footnote-ref-59)
59. 59 Id. at 614-15. [↑](#footnote-ref-60)
60. 60 Id. at 618. [↑](#footnote-ref-61)
61. 61 42 U.S.C. § 1981(a) (2000). [↑](#footnote-ref-62)
62. 62 Runyon v. McCrary, 427 U.S. 160, 173 (1976). [↑](#footnote-ref-63)
63. 63 CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1954 (2008) (internal quotation marks omitted). [↑](#footnote-ref-64)
64. 64 Id. at 1954-55. [↑](#footnote-ref-65)
65. 65 Id. at 1954. [↑](#footnote-ref-66)
66. 66 Id. Although Mr. Humphries also filed charges of discrimination and retaliation under Title VII, and eventually filed suit in court claiming violations of Title VII as well as § 1981, his Title VII claims were dismissed "for failure to pay necessary filing fees on a timely basis." Id. Therefore, consideration was only given to his claims filed under § 1981. Id. [↑](#footnote-ref-67)
67. 67 See id. at 1958 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (holding right to bring retaliation claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000 & Supp. V 2005)); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (holding right to bring retaliation claim under 42 U.S.C. § 1982 (2000))). [↑](#footnote-ref-68)
68. 68 See Sullivan, 396 U.S. at 235. [↑](#footnote-ref-69)
69. 69 Id. at 237. [↑](#footnote-ref-70)
70. 70 Humphries, 128 S. Ct. at 1956 (citing Runyon v. McCrary, 427 U.S. 160, 173 (1976)). [↑](#footnote-ref-71)
71. 71 Id. at 1959. [↑](#footnote-ref-72)
72. 72 Humphries, 128 S. Ct. at 1959. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) significantly limited the scope of § 1981 as a remedial statute for employment discrimination claims, prompting the Congressional response in 1991 to amend § 1981. Id. at 1956-57. The Court noted that after passage of the amended § 1981, circuit courts, including the Fifth Circuit, interpreted § 1981 as encompassing retaliation claims. Id. at 1957 (citing Foley v. Univ. of Houston Sys., 355 F.3d 333, 338-39 (5th Cir. 2003)). [↑](#footnote-ref-73)
73. 73 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000 & Supp. V 2005). [↑](#footnote-ref-74)
74. 74 See Texas Commission on Human Rights Act, Tex. Lab. Code Ann. §§ 21.001-.556 (Vernon 2006). [↑](#footnote-ref-75)
75. 75 Rehabilitation Act of 1973 §§ 501, 504, 29 U.S.C.A. §§ 791, 794 (West 1999 & Supp. 2008). [↑](#footnote-ref-76)
76. 76 See Pinkerton v. Spellings, 529 F.3d 513, 516-17 (5th Cir. May 2008) (citing 29 U.S.C. § 791(g) (2000)). [↑](#footnote-ref-77)
77. 77 Id. at 514-15. [↑](#footnote-ref-78)
78. 78 Id. at 514. The court identified him as "visibly disabled and limited in his ability to use a keyboard." Id. [↑](#footnote-ref-79)
79. 79 Id. at 515-16. [↑](#footnote-ref-80)
80. 80 Id. at 515 (emphasis omitted). [↑](#footnote-ref-81)
81. 81 Id. [↑](#footnote-ref-82)
82. 82 Id. at 516 (citing 29 U.S.C. § 794(d) (2000)). [↑](#footnote-ref-83)
83. 83 Id. at 516 n.10 (citing § 794(a)). [↑](#footnote-ref-84)
84. 84 Id. at 516. [↑](#footnote-ref-85)
85. 85 Id. (citing 29 U.S.C. § 791(g)). [↑](#footnote-ref-86)
86. 86 Id. at 517. [↑](#footnote-ref-87)
87. 87 Id. at 518 (noting the conflicts between cases like Still v. Freeport-McMoran, Inc., 120 F.3d 50, 51-52 (5th Cir. 1997) (per curiam), which used the sole causation standard, and Soledad v. U.S. Dep't of Treasury, 304 F.3d 500, 503-05 (5th Cir. 2002), which stated that discrimination does not have to be the sole causation for the adverse employment action). [↑](#footnote-ref-88)
88. 88 Id. at 519. [↑](#footnote-ref-89)
89. 89 Id. [↑](#footnote-ref-90)
90. 90 See Arredondo v. Gulf Bend Ctr., 252 F. App'x 627, 629-30 (5th Cir. Oct. 2007). [↑](#footnote-ref-91)
91. 91 Id. at 630. To establish a prima facie case under the APA for discrimination, one must prove that the plaintiff suffers from a disability, that the plaintiff is qualified for the job, that the plaintiff was the subject of an adverse employment action, and that the plaintiff was replaced by an employee that was not disabled or treated with less favor than a non-disabled employee. Id. (citing Seaman v. CSPH, Inc., 179 F.3d 297, 300 (5th Cir. 1999)). [↑](#footnote-ref-92)
92. 92 Id. (quoting 42 U.S.C. § 12102(2) (2000)). [↑](#footnote-ref-93)
93. 93 Id. [↑](#footnote-ref-94)
94. 94 Id. [↑](#footnote-ref-95)
95. 95 See id. [↑](#footnote-ref-96)
96. 96 See ADA Amendments Act of 2008, Pub. L. No. 110- 325, § 4(a), 122 Stat. 3553, 3556 (2008) (to be codified at 42 U.S.C. § 12102(4)(E)(i)) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as8100002303081000023030 medication . . . .). [↑](#footnote-ref-97)
97. 97 Cooper v. Dallas Police Ass'n, 278 F. App'x 318, 319 (5th Cir. May 2008). [↑](#footnote-ref-98)
98. 98 Id. The plaintiff also alleged that she was denied financial assistance under Title VII of the Civil Rights Act, 42 U.S.C. § 2000. Id. [↑](#footnote-ref-99)
99. 99 Id. at 321 (quoting 42 U.S.C. § 12111(8)) (internal quotation marks omitted). [↑](#footnote-ref-100)
100. 100 Id. [↑](#footnote-ref-101)
101. 101 See id. [↑](#footnote-ref-102)
102. 102 See LeBlanc v. Lamar State Coll., 232 S.W.3d 294, 297-305 (Tex. App.-Beaumont 2007, no pet.); see also Tex. Lab. Code Ann. § 21.051 (Vernon 2006) (defining discrimination by an employer). [↑](#footnote-ref-103)
103. 103 LeBlanc, 232 S.W.3d at 298, 303. [↑](#footnote-ref-104)
104. 104 See id. at 296-98. [↑](#footnote-ref-105)
105. 105 Id. at 299-303. [↑](#footnote-ref-106)
106. 106 Id. at 300. [↑](#footnote-ref-107)
107. 107 Id. at 303. [↑](#footnote-ref-108)
108. 108 Id. (citing Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 232, 234-35 (5th Cir. 2001)). [↑](#footnote-ref-109)
109. 109 Id. (quoting Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 509 (5th Cir. 2003)) (internal quotation marks omitted). [↑](#footnote-ref-110)
110. 110 Id. at 305 (discussing Gowesky, 321 F.3d 503; Flowers, 247 F.3d 229). [↑](#footnote-ref-111)
111. 111 Id. at 303-05. [↑](#footnote-ref-112)
112. 112 Id. at 305. [↑](#footnote-ref-113)
113. 113 Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000 & Supp. V 2005). [↑](#footnote-ref-114)
114. 114 Downey v. Strain, 510 F.3d 534, 538 (5th Cir. Dec. 2007). [↑](#footnote-ref-115)
115. 115 Id. at 536. [↑](#footnote-ref-116)
116. 116 Id. [↑](#footnote-ref-117)
117. 117 Id. [↑](#footnote-ref-118)
118. 118 Id. [↑](#footnote-ref-119)
119. 119 Id. [↑](#footnote-ref-120)
120. 120 Id. [↑](#footnote-ref-121)
121. 121 Id. [↑](#footnote-ref-122)
122. 122 Id. [↑](#footnote-ref-123)
123. 123 Id. at 537. [↑](#footnote-ref-124)
124. 124 Id. (citing 29 C.F.R. § 825.208(a)-(b)(1) (2008)). Section 825.208(a) requires an employer to designate leave, paid or unpaid, as FMLA qualifying and to notify the employee of the designation. Id. at 538. Section 825.208(b)(1) requires the employer, once it knows that leave "is being taken for an FMLA required reason," to notify the employee promptly (i.e., within two business days) that the paid leave is "designated and will be counted as FMLA leave." Id. [↑](#footnote-ref-125)
125. 125 Id. at 538. [↑](#footnote-ref-126)
126. 126 Id. at 539 (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88 (2002)). [↑](#footnote-ref-127)
127. 127 Id. at 539-40 (citing Lubke v. City of Arlington, 455 F.3d 489, 496-97 (5th Cir. 2006)). [↑](#footnote-ref-128)
128. 128 Id. at 540. [↑](#footnote-ref-129)
129. 129 Id. at 541. [↑](#footnote-ref-130)
130. 130 Id. at 542, 545. [↑](#footnote-ref-131)
131. 131 Durose v. Grand Casino of Miss., Inc., 251 F. App'x 886, 889 (5th Cir. Oct. 2008) (per curiam). [↑](#footnote-ref-132)
132. 132 Id. [↑](#footnote-ref-133)
133. 133 Id. at 890-91. [↑](#footnote-ref-134)
134. 134 See Lyons v. N.E. Indep. Sch. Dist., 277 F. App'x 455, 456 (5th Cir. May 2008) (per curiam). [↑](#footnote-ref-135)
135. 135 Id. [↑](#footnote-ref-136)
136. 136 Id. [↑](#footnote-ref-137)
137. 137 Id. [↑](#footnote-ref-138)
138. 138 Id. [↑](#footnote-ref-139)
139. 139 Id. [↑](#footnote-ref-140)
140. 140 Id. [↑](#footnote-ref-141)
141. 141 Id. [↑](#footnote-ref-142)
142. 142 Id.; see also 29 U.S.C. § 2612(a) (2000 & Supp. V 2005). [↑](#footnote-ref-143)
143. 143 Lyons, 277 F. App'x at 456-57. [↑](#footnote-ref-144)
144. 144 Id. [↑](#footnote-ref-145)
145. 145 For additional ERISA coverage during this Survey period, see Jayne Zanglein & Janet Ford, Deja Vu All Over Again: Will the Supreme Court's ERISA Decisions Prompt the Fifth Circuit To Revise Its Standards?, 41 Tex. Tech L. Rev. 897 (2009). [↑](#footnote-ref-146)
146. 146 See LaRue v. DeWolff, Boberg & Assocs., 128 S. Ct. 1020, 1022-23 (2008). [↑](#footnote-ref-147)
147. 147 Id. at 1023. [↑](#footnote-ref-148)
148. 148 Id. ERISA permits a participant to bring a civil action to enjoin any act or practice that violates ERISA or the terms of the plan, or to obtain "appropriate equitable relief" for these violations. 29 U.S.C. § 1132(a)(3) (2000 & Supp. 2005). [↑](#footnote-ref-149)
149. 149 LaRue, 128 S. Ct. at 1022-23. [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 Id. [↑](#footnote-ref-152)
152. 152 See id. at 1025-26. [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000). [↑](#footnote-ref-155)
155. 155 Firestone, 489 U.S. at 111. [↑](#footnote-ref-156)
156. 156 Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2347-48 (2008) (quoting Firestone, 489 U.S. at 115). [↑](#footnote-ref-157)
157. 157 Firestone, 489 U.S. at 115. [↑](#footnote-ref-158)
158. 158 Glenn, 128 S. Ct. at 2346. [↑](#footnote-ref-159)
159. 159 Id. [↑](#footnote-ref-160)
160. 160 Id. [↑](#footnote-ref-161)
161. 161 See id. [↑](#footnote-ref-162)
162. 162 See id. [↑](#footnote-ref-163)
163. 163 Id. at 2346-47. [↑](#footnote-ref-164)
164. 164 See id. at 2346. [↑](#footnote-ref-165)
165. 165 See id. at 2347. [↑](#footnote-ref-166)
166. 166 See id. at 2346-47. [↑](#footnote-ref-167)
167. 167 See id. at 2347. [↑](#footnote-ref-168)
168. 168 Id. at 2347-48. [↑](#footnote-ref-169)
169. 169 Id. at 2348. Seven of the justices concluded that an employer that both administers and self-funds a plan also operates under such a conflict; however, Justices Scalia and Thomas wanted to avoid reaching this issue based on the facts of the case. See id. at 2357 (Scalia, J., dissenting). [↑](#footnote-ref-170)
170. 170 Id. at 2352 (majority opinion). [↑](#footnote-ref-171)
171. 171 Id. at 2347, 2350. [↑](#footnote-ref-172)
172. 172 Id. at 2346. As articulated by Glenn, courts are to give more weight to the conflict of interest factor when the circumstances demonstrate that the conflict affected the decision to deny benefits, and they are to give less weight to the conflict if "the administrator has taken active steps to reduce potential bias and to promote accuracy." Id. at 2351. [↑](#footnote-ref-173)
173. 173 Id. at 2351-52. [↑](#footnote-ref-174)
174. 174 Washington v. Murphy ***Oil*** USA, Inc., 497 F.3d 453, 455 (5th Cir. Aug. 2007); see 29 U.S.C. § 1022(a) (2006). [↑](#footnote-ref-175)
175. 175 Washington, 497 F.3d at 456. [↑](#footnote-ref-176)
176. 176 Id. at 455. The length of Mr. Washington's service was disputed by the parties, but the issue was not before the court, and the disagreement was immaterial to the court's holding. Id. [↑](#footnote-ref-177)
177. 177 Id. at 456. [↑](#footnote-ref-178)
178. 178 Id. Indeed, the court noted that although the company's counsel eventually conceded at oral argument that the wording in the two documents conflicted, the company's steadfast position throughout the appeal (until that concession) of the absence of a conflict exposed the company to a finding of abuse of discretion. Id. at 457. The court held on the basis of Fifth Circuit case law that "when the trustee's interpretation of a plan is in direct conflict with express language in a plan . . . [there] is a very strong indication of arbitrary and capricious behavior." Id. (quoting Batchelor v. IBEW Local 861 Pension and Ret. Fund, 877 F.2d 441, 445 (5th Cir. 1989)) (internal quotation marks omitted). [↑](#footnote-ref-179)
179. 179 Id. at 456 (citing Hansen v. Cont'l Ins. Co., 940 F.2d 971, 981-82 (5th Cir. 1991)). [↑](#footnote-ref-180)
180. 180 Id. at 457-58. [↑](#footnote-ref-181)
181. 181 Id. at 458-59. [↑](#footnote-ref-182)
182. 182 Id. at 459. [↑](#footnote-ref-183)
183. 183 Custer v. Murphy ***Oil*** USA, Inc., 503 F.3d 415 (5th Cir. Oct. 2007). [↑](#footnote-ref-184)
184. 184 Id. at 417. [↑](#footnote-ref-185)
185. 185 Id. [↑](#footnote-ref-186)
186. 186 Id. [↑](#footnote-ref-187)
187. 187 Id. [↑](#footnote-ref-188)
188. 188 Id. [↑](#footnote-ref-189)
189. 189 Id. [↑](#footnote-ref-190)
190. 190 Id. [↑](#footnote-ref-191)
191. 191 See id. [↑](#footnote-ref-192)
192. 192 Id. at 418-19 (quoting 29 C.F.R. § 2520.104b- 1(b)(1) (2002)); see also 29 U.S.C. § 1024(b)(1) (2000 & Supp. V 2005). [↑](#footnote-ref-193)
193. 193 Custer, 503 F.3d at 418-19 (citing Williams v. Plumbers & Steamfitters Local 60 Pension Plan, 48 F.3d 923, 926 (5th Cir. 1995)). [↑](#footnote-ref-194)
194. 194 Id. at 419. [↑](#footnote-ref-195)
195. 195 Id. at 423-24. [↑](#footnote-ref-196)
196. 196 Id. at 424. [↑](#footnote-ref-197)
197. 197 Amschwand v. Spherion Corp., 505 F.3d 342, 343 (5th Cir. Oct. 2007) (citing 29 U.S.C. § 1132(a)(3) (2000 & Supp. V 2005)). [↑](#footnote-ref-198)
198. 198 Id. [↑](#footnote-ref-199)
199. 199 Id. [↑](#footnote-ref-200)
200. 200 Id. at 344. [↑](#footnote-ref-201)
201. 201 Id. at 348 (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)). [↑](#footnote-ref-202)
202. 202 Id. (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)). [↑](#footnote-ref-203)
203. 203 McAteer v. Silverleaf Resorts, 514 F.3d 411, 413 (5th Cir. Jan. 2008). [↑](#footnote-ref-204)
204. 204 Id. [↑](#footnote-ref-205)
205. 205 Id. at 413-14. [↑](#footnote-ref-206)
206. 206 Id. [↑](#footnote-ref-207)
207. 207 Id. at 414. [↑](#footnote-ref-208)
208. 208 Id. [↑](#footnote-ref-209)
209. 209 Id. [↑](#footnote-ref-210)
210. 210 Id. [↑](#footnote-ref-211)
211. 211 Id. at 416 (citing Hook v. Morrison Milling Co., 38 F.3d 776 (5th Cir. 1994)). [↑](#footnote-ref-212)
212. 212 Id. (citing Aetna Health Inc. v. Davila, 542 U.S. 200 (2004); Hook, 38 F.3d at 776). [↑](#footnote-ref-213)
213. 213 Id. at 417-18. [↑](#footnote-ref-214)
214. 214 Id. at 418. [↑](#footnote-ref-215)
215. 215 Id. at 418-19. The McAteer court also noted that it had reviewed the impact of the Davila case on existing Fifth Circuit ERISA jurisprudence in Woods v. Texas Aggregates, L.L.C. and had determined that Hook was still good law. Id. (citing Woods v. Texas Aggregates, L.L.C., 459 F.3d 600, 601 (5th Cir. 2006)). [↑](#footnote-ref-216)
216. 216 Shearer v. Sw. Serv. Life Ins. Co., 516 F.3d 276, 278 (5th Cir. Jan. 2008). Given the procedural posture of the case, and the fact that the lawsuit had been removed to federal court pursuant to ERISA, the case also involved the question of appropriate federal court jurisdiction to adjudicate the dispute. See id. [↑](#footnote-ref-217)
217. 217 Id. at 277. [↑](#footnote-ref-218)
218. 218 Id. [↑](#footnote-ref-219)
219. 219 Id. at 277-78. [↑](#footnote-ref-220)
220. 220 Id. at 278. Claims were thus removable pursuant to 28 U.S.C. § 1331 (2000). Id. [↑](#footnote-ref-221)
221. 221 Id. [↑](#footnote-ref-222)
222. 222 Id. at 278-79. [↑](#footnote-ref-223)
223. 223 Id. at 278 (omissions in original) (quoting 29 U.S.C. § 1002(1) (2000 & Supp. V 2005)). [↑](#footnote-ref-224)
224. 224 Id. at 279. [↑](#footnote-ref-225)
225. 225 Id. [↑](#footnote-ref-226)
226. 226 Id. (citing Hansen v. Cont'l Ins. Co., 940 F.2d 971, 978 (5th Cir. 1991)). [↑](#footnote-ref-227)
227. 227 Id. at 279-80. [↑](#footnote-ref-228)
228. 228 Id. at 280. [↑](#footnote-ref-229)
229. 229 See E.I. DuPont De Nemours & Co. v. Sawyer, 517 F.3d 785, 789-90 (5th Cir. Feb. 2008). [↑](#footnote-ref-230)
230. 230 Id. at 790. [↑](#footnote-ref-231)
231. 231 Id. at 789-90. [↑](#footnote-ref-232)
232. 232 See id. at 791. [↑](#footnote-ref-233)
233. 233 Id. [↑](#footnote-ref-234)
234. 234 Id. [↑](#footnote-ref-235)
235. 235 Id. [↑](#footnote-ref-236)
236. 236 Id. at 791-92. [↑](#footnote-ref-237)
237. 237 Id. at 792. [↑](#footnote-ref-238)
238. 238 Id. at 797 (quoting Aetna Health, Inc. v. Davila, 542 U.S. 200, 209 (2004)); see 29 U.S.C. § 1132(a) (2000 & Supp. V 2005) (explaining ERISA's civil enforcement provision). [↑](#footnote-ref-239)
239. 239 Sawyer, 517 F.3d at 797-98 (discussing Varity Corp. v. Howe, 516 U.S. 489, 492 (1996)). [↑](#footnote-ref-240)
240. 240 Id. at 799. [↑](#footnote-ref-241)
241. 241 Id. (quoting Howe, 516 U.S. at 501, 505). [↑](#footnote-ref-242)
242. 242 Id. The Court noted that the discussions in this case had included topics such as the voluntary transfer process, the status of the new collective bargaining unit, transfer of seniority rights, and working conditions. Id. at 799 n.8. [↑](#footnote-ref-243)
243. 243 Id. at 799. [↑](#footnote-ref-244)
244. 244 Id. "ERISA 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .'" Id. (quoting 29 U.S.C. § 1144(a)). [↑](#footnote-ref-245)
245. 245 Id. at 800 (quoting Bank of La. v. Aetna U.S. Healthcare, Inc., 468 F.3d 237, 242 (5th Cir. 2006)) (internal quotation marks omitted); see Mayeaux v. La. Health Serv. & Indemn. Co., 376 F.3d 420, 432 (5th Cir. 2004). [↑](#footnote-ref-246)
246. 246 Sawyer, 517 F.3d at 800. [↑](#footnote-ref-247)
247. 247 Id. at 801. [↑](#footnote-ref-248)
248. 248 Kirschbaum v. Reliant Energy, 526 F.3d 243, 246-47 (5th Cir. Apr. 2008). [↑](#footnote-ref-249)
249. 249 Id. at 247. [↑](#footnote-ref-250)
250. 250 Id. [↑](#footnote-ref-251)
251. 251 Id. at 248. [↑](#footnote-ref-252)
252. 252 Id. [↑](#footnote-ref-253)
253. 253 Id. (citing 29 U.S.C. § 1104(a)(1) (2000 & Supp. V 2005)). [↑](#footnote-ref-254)
254. 254 Id. (citing Donovan v. Cunningham, 716 F.2d 1455, 1466-67 (5th Cir. 1983)); see 29 U.S.C. §§ 1104(a)(2), 1107(a)(3)(A) (2000 & Supp. V 2005). [↑](#footnote-ref-255)
255. 255 Kirschbaum, 526 F.3d at 250-53. [↑](#footnote-ref-256)
256. 256 Id. at 256 (citing Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995)). [↑](#footnote-ref-257)
257. 257 Id. [↑](#footnote-ref-258)
258. 258 See id. at 255-56. [↑](#footnote-ref-259)
259. 259 See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000 & Supp. V 2005). [↑](#footnote-ref-260)
260. 260 See Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 621 (5th Cir. May 2008). [↑](#footnote-ref-261)
261. 261 Id. [↑](#footnote-ref-262)
262. 262 Id. [↑](#footnote-ref-263)
263. 263 Id. at 622. [↑](#footnote-ref-264)
264. 264 Id. at 621-22. [↑](#footnote-ref-265)
265. 265 Id. at 622. [↑](#footnote-ref-266)
266. 266 Id. [↑](#footnote-ref-267)
267. 267 Id. [↑](#footnote-ref-268)
268. 268 Id. Hagan invoked 29 U.S.C. § 215(a)(3) (2000), which states in pertinent part that it is unlawful to discharge any employee because such employee has filed any complaint under the FLSA. Id. at 623. [↑](#footnote-ref-269)
269. 269 Id. [↑](#footnote-ref-270)
270. 270 Id. at 623-25. "This Circuit has never addressed the exact contours of protected activity under Section 215(a)(3) in the context of filing a complaint . . . ." Id. at 625. [↑](#footnote-ref-271)
271. 271 Id. at 625-26. [↑](#footnote-ref-272)
272. 272 Id. at 626. [↑](#footnote-ref-273)
273. 273 Id. [↑](#footnote-ref-274)
274. 274 Id. at 627-28. That is, whether Hagan had "step[ped] outside his . . . role of representing the company by either filing (or threatening to file) an action adverse to the employer, by actively assisting other employees in asserting FLSA rights, or by otherwise engaging in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." Id. (quoting McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996)) (internal quotation marks omitted). [↑](#footnote-ref-275)
275. 275 Id. at 630. [↑](#footnote-ref-276)
276. 276 Id. [↑](#footnote-ref-277)
277. 277 Moran v. Ceiling Fans Direct, Inc., 239 F. App'x 931, 933-34 (5th Cir. Sept. 2007). [↑](#footnote-ref-278)
278. 278 Id. at 936 (quoting In re Halliburton Co., 80 S.W.3d 566, 568 (Tex. 2002)). [↑](#footnote-ref-279)
279. 279 Id. at 937. [↑](#footnote-ref-280)
280. 280 Id. [↑](#footnote-ref-281)
281. 281 Id. [↑](#footnote-ref-282)
282. 282 Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2377-78 (2007). [↑](#footnote-ref-283)
283. 283 Id. at 2382-83. [↑](#footnote-ref-284)
284. 284 See NLRB v. Allied Aviation Fueling of Dallas L.P., 490 F.3d 374, 377 (5th Cir. June 2007). [↑](#footnote-ref-285)
285. 285 Id. at 376-77. [↑](#footnote-ref-286)
286. 286 Id. [↑](#footnote-ref-287)
287. 287 Id. at 377. [↑](#footnote-ref-288)
288. 288 Id. [↑](#footnote-ref-289)
289. 289 Id. [↑](#footnote-ref-290)
290. 290 Id. [↑](#footnote-ref-291)
291. 291 Id. [↑](#footnote-ref-292)
292. 292 Id. [↑](#footnote-ref-293)
293. 293 See 29 U.S.C. §§ 158(a)(1), (a)(3) (2000). [↑](#footnote-ref-294)
294. 294 See Allied Aviation Fueling, 490 F.3d at 379-80. [↑](#footnote-ref-295)
295. 295 Id. The company claimed that Sanford testified at an administrative hearing, and that he "benefited" from the filing of the grievance because through his actions "the outsourcing of the work slowed down." Id. [↑](#footnote-ref-296)
296. 296 Id. at 379. [↑](#footnote-ref-297)
297. 297 Id. (citing NLRB v. ADCO Elec., Inc., 6 F.3d 1110, 1116 (5th Cir. 1993)). [↑](#footnote-ref-298)
298. 298 Id. (citing Boaz Spinning Co. v. NLRB, 395 F.2d 512, 514 (5th Cir. 1968)). [↑](#footnote-ref-299)
299. 299 Id. [↑](#footnote-ref-300)
300. 300 Id. at 380. [↑](#footnote-ref-301)
301. 301 See Strand Theatre of Shreveport Corp. v. NLRB, 493 F.3d 515, 517 (5th Cir. July 2007). [↑](#footnote-ref-302)
302. 302 See id. [↑](#footnote-ref-303)
303. 303 Id. [↑](#footnote-ref-304)
304. 304 See id. at 518. [↑](#footnote-ref-305)
305. 305 See id. [↑](#footnote-ref-306)
306. 306 See id. [↑](#footnote-ref-307)
307. 307 See id. at 517-18. [↑](#footnote-ref-308)
308. 308 See id. at 518 ("Section 9(a) of the NLRA requires employers to bargain with unions that have been 'designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.'" (quoting 29 U.S.C. § 159(a) (2000))). [↑](#footnote-ref-309)
309. 309 Id. at 519 (citing Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 534 (D.C. Cir. 2003)). [↑](#footnote-ref-310)
310. 310 See id. at 518. The court should uphold the NLRB's decision "'if it is reasonable and supported by substantial evidence on the record considered as a whole.'" Id. (quoting J. Vallery Elec., Inc. v. NLRB, 337 F.3d 446, 450 (5th Cir. 2003)). [↑](#footnote-ref-311)
311. 311 See id. at 520. [↑](#footnote-ref-312)
312. 312 See Cal. Gas Transp., Inc. v. NLRB, 507 F.3d 847,850 (5th Cir. Nov. 2007). [↑](#footnote-ref-313)
313. 313 See id. [↑](#footnote-ref-314)
314. 314 See id. at 851. [↑](#footnote-ref-315)
315. 315 Id. at 850. [↑](#footnote-ref-316)
316. 316 See id. at 852-53. [↑](#footnote-ref-317)
317. 317 See id. at 853 (citing Moncrief ***Oil*** Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007) ("This Court may affirm on any ground supported by the record . . . .")). [↑](#footnote-ref-318)
318. 318 See Sara Lee Bakery Group, Inc. v. NLRB, 514 F.3d 422, 428 (5th Cir. Jan. 2008). [↑](#footnote-ref-319)
319. 319 See id. at 425. [↑](#footnote-ref-320)
320. 320 See id. [↑](#footnote-ref-321)
321. 321 Cross-docking is a practice in which drivers from each of these facilities would meet and exchange loads midway at a depot in Louisville. See id. at 425-26. [↑](#footnote-ref-322)
322. 322 Backhauling is a practice in which drivers from the London facility would deliver products to the Owensboro facility and then return with products to be delivered to the London facility. See id. at 426. [↑](#footnote-ref-323)
323. 323 See id. [↑](#footnote-ref-324)
324. 324 See id. [↑](#footnote-ref-325)
325. 325 See id. [↑](#footnote-ref-326)
326. 326 See id. at 427. [↑](#footnote-ref-327)
327. 327 See id. at 428. [↑](#footnote-ref-328)
328. 328 See id. at 429. [↑](#footnote-ref-329)
329. 329 Id. (quoting NLRB v. Talsol Corp., 155 F.3d 785, 794 (6th Cir. 1998)). [↑](#footnote-ref-330)
330. 330 See id. at 429-30. [↑](#footnote-ref-331)
331. 331 Id. at 429 (citing Vanguard Fire & Supply Co. v. NLRB, 468 F.3d 952 (6th Cir. 2006)). [↑](#footnote-ref-332)
332. 332 Id. at 430 (internal quotation marks omitted). [↑](#footnote-ref-333)
333. 333 See id. at 431. [↑](#footnote-ref-334)
334. 334 See id. at 432. [↑](#footnote-ref-335)
335. 335 See 18 U.S.C. § 1514A (2006). No publicly traded company may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" because of any lawful act done by the employee "(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the federal criminal laws concerning mail fraud, wire fraud, bank fraud or securities fraud, or "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Id. § 1514A(a). An employee must file a complaint with the Secretary no later than ninety days after the date on which the alleged violation occurred. Id. § 1514A(b)(2)(D). [↑](#footnote-ref-336)
336. 336 Allen v. Admin. Review Bd., 514 F.3d 468, 471-72 (5th Cir. Jan. 2008). [↑](#footnote-ref-337)
337. 337 Id. at 472. [↑](#footnote-ref-338)
338. 338 Id. at 474-75. [↑](#footnote-ref-339)
339. 339 Id. at 471. Under the review process established by Sarbanes Oxley, the petitioners filed an agency complaint that was heard by an administrative law judge in the U.S. Department of Labor. Id. The judge dismissed their complaint, and they appealed to the Administrative Review Board (ARB). Id. The ARB affirmed the judge's decision, which constituted a final order by the Secretary of Labor. Id. Petitioners then sought review from the Fifth Circuit. Id. Pursuant to 49 U.S.C. § 42121(b)(4)(A), the Fifth Circuit applied the standard of review in the Administrative Procedure Act, 5 U.S.C. § 706 (2006); thus the decision by the ARB was to be upheld unless it was found to be arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Id. at 476. [↑](#footnote-ref-340)
340. 340 Id. at 475-75 (noting that 18 U.S.C. § 1514A(b)(2)(C) mandates that the applicable burden of proof is found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)). [↑](#footnote-ref-341)
341. 341 Id. at 475-76 (citing 49 U.S.C. § 42121(b)(2)(B)(iii) (2000)); see also 29 C.F.R. § 1980.104. Allen pointed out that a "contributing factor" equates to "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Allen, 514 F.3d at 476 n.3. [↑](#footnote-ref-342)
342. 342 Allen, 514 F.3d at 476 (citing 49 U.S.C. § 42121(b)(2)(B)(iv) (2000)). [↑](#footnote-ref-343)
343. 343 Id. [↑](#footnote-ref-344)
344. 344 Id. at 476-77; see 18 U.S.C. § 1514A (2006). [↑](#footnote-ref-345)
345. 345 Allen, 514 F.3d at 477 (citing Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 348 (5th Cir. 2007)) (noting that the objective reasonableness standard in SOX cases is similar to the one applied in Title VII retaliation claims). [↑](#footnote-ref-346)
346. 346 Id. at 480. [↑](#footnote-ref-347)
347. 347 Getman v. Admin. Review Bd., 265 F. App'x 317, 318 (5th Cir. Feb. 2008). [↑](#footnote-ref-348)
348. 348 Id. [↑](#footnote-ref-349)
349. 349 Id. [↑](#footnote-ref-350)
350. 350 Id. [↑](#footnote-ref-351)
351. 351 Id. [↑](#footnote-ref-352)
352. 352 See id. at 320-21. [↑](#footnote-ref-353)
353. 353 See id. [↑](#footnote-ref-354)
354. 354 Id. [↑](#footnote-ref-355)
355. 355 See Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (2000 & Supp. V 2005). [↑](#footnote-ref-356)
356. 356 See 29 U.S.C. § 2102 (2000 & Supp. V 2005). [↑](#footnote-ref-357)
357. 357 Plasticsource Workers Comm. v. Coburn, 283 F. App'x 181, 185 (5th Cir. Feb. 2008) (citing Staudt v. Glastron, Inc., 92 F.3d 312, 314 (5th Cir. 1996)); see 29 U.S.C. § 2104 (2000 & Supp. V 2005). [↑](#footnote-ref-358)
358. 358 Coburn, 283 F. App'x at 182. [↑](#footnote-ref-359)
359. 359 See id. at 186. [↑](#footnote-ref-360)
360. 360 See id. at 184-85. [↑](#footnote-ref-361)
361. 361 Id. at 186 (citing Hollowell v. Orleans Reg'l Hosp., 217 F.3d 379, 385 (5th Cir. 2000)). [↑](#footnote-ref-362)
362. 362 Id. (citing Castleberry v. Branscum, 721 S.W.2d 270, 271 (Tex. 1986) (recognizing that individuals who abuse corporate privilege are subject to disregard of corporate fiction and individual liability)). [↑](#footnote-ref-363)
363. 363 Id. at 186. [↑](#footnote-ref-364)
364. 364 Trinity Marine Prods., Inc. v. Chao, 512 F.3d 198, 200, 202 (5th Cir. Dec. 2007). The criminal procedure implications of this case are fully discussed elsewhere in this Survey. See Charles Baird & Kristin Avots, Fourth Amendment, 41 Tex. Tech L. Rev. 961 (2009). [↑](#footnote-ref-365)
365. 365 Trinity Marine Prods., 512 F.3d at 200. [↑](#footnote-ref-366)
366. 366 Id. [↑](#footnote-ref-367)
367. 367 Id. [↑](#footnote-ref-368)
368. 368 Id. at 201. [↑](#footnote-ref-369)
369. 369 Id. [↑](#footnote-ref-370)
370. 370 Id. [↑](#footnote-ref-371)
371. 371 Id. This made the judge's decision a final order of the Occupation Safety and Health Review Commission pursuant to 29 U.S.C. § 659(c) (2000). Id. Thus, Trinity's petition for review of the agency's decision was authorized by 29 U.S.C. § 660 (2000). Id. [↑](#footnote-ref-372)
372. 372 Id. at 202. [↑](#footnote-ref-373)
373. 373 Id. [↑](#footnote-ref-374)
374. 374 Id. (referring to Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)). [↑](#footnote-ref-375)
375. 375 Navigant Consulting, Inc. v. Wilkinson, 508 F.3d 277, 280 (5th Cir. Nov. 2007). [↑](#footnote-ref-376)
376. 376 Id. [↑](#footnote-ref-377)
377. 377 Id. [↑](#footnote-ref-378)
378. 378 Id. [↑](#footnote-ref-379)
379. 379 Id. [↑](#footnote-ref-380)
380. 380 Id. at 280-81. [↑](#footnote-ref-381)
381. 381 Id. at 281. [↑](#footnote-ref-382)
382. 382 Id. [↑](#footnote-ref-383)
383. 383 Id. [↑](#footnote-ref-384)
384. 384 Id. [↑](#footnote-ref-385)
385. 385 Id. at 281-82. [↑](#footnote-ref-386)
386. 386 Id. at 282. [↑](#footnote-ref-387)
387. 387 Id. at 283 (citing Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.-Dallas 2006, pet. denied)). The elements required for a breach of fiduciary claim are "(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." Id. (quoting Jones, 196 S.W.3d at 447) (internal quotation marks omitted). [↑](#footnote-ref-388)
388. 388 Id. (citing Molex, Inc. v. Nolen, 759 F.2d 474, 479 (5th Cir. 1985) (applying Texas law)). [↑](#footnote-ref-389)
389. 389 Id. (citing Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503, 510 (Tex. App. -Houston [1st Dist.] 2003, no pet.)). [↑](#footnote-ref-390)
390. 390 Id. at 284 (quoting Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 201 (Tex. 2002)). [↑](#footnote-ref-391)
391. 391 Id. (citing Johnson, 73 S.W.3d at 202). [↑](#footnote-ref-392)
392. 392 Id. at 290-91. [↑](#footnote-ref-393)
393. 393 Id. at 291-92. [↑](#footnote-ref-394)
394. 394 Id. at 300. [↑](#footnote-ref-395)
395. 395 ***Kern*** v. Sitel Corp., 517 F.3d 306, 308 (5th Cir. Feb. 2008). [↑](#footnote-ref-396)
396. 396 Id. [↑](#footnote-ref-397)
397. 397 Id. [↑](#footnote-ref-398)
398. 398 Id. [↑](#footnote-ref-399)
399. 399 Id. [↑](#footnote-ref-400)
400. 400 Id. [↑](#footnote-ref-401)
401. 401 Id. at 308-09. Arguing that all of Mr. ***Kern***'s revenue was generated from one customer, the company based its calculation on that portion of the Plan, which recited that the maximum incentive payment to be received in one fiscal year for any one account was $ 150,000. Id. at 308. [↑](#footnote-ref-402)
402. 402 Id. at 308-09. "The Business Unit President and Vice President of Human Resources Representative will resolve disputes over interpretation of any aspects of this [P]lan. The decision of the Business Unit President shall be final." Id. (emphasis added). Furthermore, "the maximum incentive payment that can be received in one fiscal year for any one account contract is US$ 150,000 subject to management review. However, there is no limit to the number of large account contracts that can be sold by any one Vice President, Business Development to any account(s) in one calendar year." Id. at 308. [↑](#footnote-ref-403)
403. 403 Id. at 308-10. [↑](#footnote-ref-404)
404. 404 Id. at 310. [↑](#footnote-ref-405)
405. 405 Id. at 310-11. [↑](#footnote-ref-406)
406. 406 Id. (citing Marsh v. Greyhound Lines, Inc., 488 F.2d 278 (5th Cir. 1974); Monsanto v. Boustany, 73 S.W.3d 225 (Tex. 2002)). [↑](#footnote-ref-407)
407. 407 Id. at 311. [↑](#footnote-ref-408)
408. 408 Id. at 312. [↑](#footnote-ref-409)
409. 409 Amigo Broad., LP v. Spanish Broad. Sys., Inc., 521 F.3d 472, 479 (5th Cir. Mar. 2008). [↑](#footnote-ref-410)
410. 410 Id. at 477-78. [↑](#footnote-ref-411)
411. 411 Id. at 478. [↑](#footnote-ref-412)
412. 412 Id. [↑](#footnote-ref-413)
413. 413 Id. at 479. [↑](#footnote-ref-414)
414. 414 Id. [↑](#footnote-ref-415)
415. 415 Id. [↑](#footnote-ref-416)
416. 416 Id. at 481 (quoting Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993)). [↑](#footnote-ref-417)
417. 417 Id. [↑](#footnote-ref-418)
418. 418 Id. at 482. [↑](#footnote-ref-419)
419. 419 Id. at 487. [↑](#footnote-ref-420)
420. 420 Id. at 489 (quoting ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997)) (internal quotations omitted). [↑](#footnote-ref-421)
421. 421 Id. at 490 (quoting Sw. Bell Tel. Co. v. John Carlo Tex., Inc., 843 S.W.2d 470, 472 (Tex. 1992)). [↑](#footnote-ref-422)
422. 422 Id. (quoting Steinmetz & Assocs., Inc. v. Crow, 700 S.W.2d 276, 277-78 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.)). [↑](#footnote-ref-423)
423. 423 Id. at 491-92. The court also noted that in assessing the evidence on appeal, it was obliged to disregard the "contradicted testimony" of one of SBS's employees in reviewing the sufficiency of Amigo Broadcasting's evidence. Id. at 491 n.22 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000)). [↑](#footnote-ref-424)
424. 424 Id. at 494. [↑](#footnote-ref-425)
425. 425 For further discussion of the following three cases and additional arbitration cases decided during this Survey period, see Donald R. Philbin, Jr. & Audrey Lynn Maness, Litigating Alternative Dispute Resolution in the Fifth Circuit, 41 Tex. Tech L. Rev. 739 (2009). [↑](#footnote-ref-426)
426. 426 Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000 & Supp. V 2005). [↑](#footnote-ref-427)
427. 427 Hall Street Associates is further discussed in this Survey in the context of business torts and alternative dispute resolution. See Sofia Adrogue, Recent Developments in Fifth Circuit Business Torts Jurisprudence, 41 Tex. Tech L. Rev. 831 (2009). [↑](#footnote-ref-428)
428. 428 §§ 10-11. [↑](#footnote-ref-429)
429. 429 § 10(a)(1)-(4). [↑](#footnote-ref-430)
430. 430 § 11(a)-(c). [↑](#footnote-ref-431)
431. 431 See, e.g., Hughes Training Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001). [↑](#footnote-ref-432)
432. 432 Id. at 590, 593 (emphasis added). [↑](#footnote-ref-433)
433. 433 See Fed. R. Civ. P. 52(a)-(b). [↑](#footnote-ref-434)
434. 434 Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1401 (2008). [↑](#footnote-ref-435)
435. 435 Id. [↑](#footnote-ref-436)
436. 436 Id. [↑](#footnote-ref-437)
437. 437 Id. at 1403 ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."). [↑](#footnote-ref-438)
438. 438 Id. [↑](#footnote-ref-439)
439. 439 Preston v. Ferrer, 128 S. Ct. 978, 981 (2008). [↑](#footnote-ref-440)
440. 440 Id. at 981-82. [↑](#footnote-ref-441)
441. 441 Id. at 982. [↑](#footnote-ref-442)
442. 442 Id. (citing Cal. Lab. Code §§ 1700 et seq. (West 2003 & Supp. 2008)). [↑](#footnote-ref-443)
443. 443 Id. at 982, 985. [↑](#footnote-ref-444)
444. 444 See id. at 983, 985, 987 (discussing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006); Allied- Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995)). [↑](#footnote-ref-445)
445. 445 Id. at 984. [↑](#footnote-ref-446)
446. 446 Lester v. Advanced Envtl. Recycling Techs., Inc., 248 F. App'x 492, 493 (5th Cir. July 2007). [↑](#footnote-ref-447)
447. 447 Id. at 494-95. [↑](#footnote-ref-448)
448. 448 See Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.003 (Vernon 2005); Lester, 248 F. App'x at 495- 96. TAA states that "[t]his chapter does not apply to . . . a claim for personal injury, except as provided by Subsection (c)." § 171.002(a). Subsection (c) retains the obligation that enforceability of an agreement to arbitrate such a claim is premised upon a written agreement to arbitrate, signed by the parties and their counsel. § 171.002(c). Another decision about arbitration by the Fifth Circuit, a case involving a dispute under the Fair Labor Standards Act, Moran v. Ceiling Fans Direct, Inc., is discussed above. See supra Part VII. [↑](#footnote-ref-449)