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Unusual Unanimity and the Ongoing Debate on the Meaning of Words: The Labor and Employment Decisions from the Supreme Court's 2013–14 Term

Michael Z. Green*

I. Introduction

In its 2013–14 term, the Supreme Court focused on labor relations, wage and hour law, whistleblowing, and employee benefits in several cases. The Court also addressed constitutional issues concerning the First Amendment, the Recess Appointments Clause, and affirmative action. The Court did not decide any employment discrimination cases during the term. Decisions in the prior term clarified the definition of a supervisor for purposes of workplace harassment¹ and addressed the burden of proof in establishing causation in retaliation claims.² The Court's respite from considering employment discrimination cases in 2013–14 was, however, very brief as three discrimination cases are scheduled for consideration during the 2014–15 term.³ The

* Professor, Texas A&M University School of Law. I would like to thank my student assistants Ali Crocker, Emily Goodman, Casandra Johnson, Mackenzie Lewis, Hisham Masri, and Chelsea Mikulencak for their diligent research efforts in reviewing the Supreme Court decisions and oral arguments. I am also grateful for the financial support from the Texas A&M University School of Law summer research grant in producing this Article. I am proud to follow in the footsteps of so many wonderful past secretaries for the ABA Labor and Employment Section who have assessed the labor and employment decisions of prior Supreme Court terms.

1. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013) (“We hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim.”).

2. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for causation” and “[t]his requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”).

3. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (Mem.) (Oct. 2, 2014) (No. 14-86) (whether the refusal to hire a woman because she wore a hijab [religious headscarf] to her interview is religious discrimination); *Young v. United Parcel Serv.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (Mem.) (July 1, 2014) (No. 12-1226) (whether an employer must reasonably accommodate pregnant employees to avoid employment discrimination under the Americans with Disabilities Act); *Mach Mining, LLC v. E.E.O.C.*, 738 F.3d 171 (7th

Court also expects to address labor and employee benefits, whistleblowing, and wage and hour law during the 2014–15 term.⁴

Even without employment discrimination cases, the 2013–14 term provided ten key cases of importance to labor and employment lawyers. Three of these involved distinctly different matters of concern for organized labor: *Sandifer v. U.S. Steel Corp.*,⁵ *NLRB v. Noel Canning*,⁶ and *Harris v. Quinn*.⁷ Two addressed employee whistleblowing matters: *Lawson v. FMR LLC*⁸ and *Lane v. Franks*.⁹ Three focused on employee benefits: *Heimeshoff v. Hartford Life & Accident Insurance Co.*,¹⁰ *Fifth Third Bancorp v. Dudenhoeffer*,¹¹ and *Burwell v. Hobby Lobby Stores, Inc.*¹² Two cases addressed issues tangentially related to employment law: one involving affirmative action, *Schuette v. Coalition to Defend Affirmative Action*,¹³ and another involving taxation of severance payments, *United States v. Quality Stores, Inc.*¹⁴

The Court initially agreed to hear two other labor and employment cases this term but subsequently found its decisions to review improvidently granted.¹⁵ In one of those cases, three justices vigorously dissented from the decision that the Court had improvidently

Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (Mem.) (June 30, 2014) (No. 13-1019) (reviewability of the scope of the Equal Employment Opportunity Commission's conciliation efforts before it may sue an employer for discrimination).

4. *See* *Perez v. Mortg. Bankers' Ass'n*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2820 (Mem.) (June 16, 2014) (No. 13-1041) (agency authority to change mortgage loan officer exemption criteria under the FLSA); *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301 (Fed. Cir. 2013), *cert. granted*, 134 S. Ct. 2290 (Mem.) (May 19, 2014) (No. 13-894) (considering if communication is specifically prohibited under the Whistleblower Protection Act); *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 43 (Mem.) (Oct. 2, 2014) (No. 13-550) (whether initial purchase of high-cost investment mutual funds instead of lower-cost funds commenced the ERISA six-year statute of limitations period or if continuing to offer these high-cost funds when lower funds were available represented a continuing breach of fiduciary duty); *M&G Polymers USA, LLC v. Tackett*, 733 F.3d 589 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 2136 (Mem.) (May 5, 2014) (No. 13-1010) (labor and employee retirement benefits); *Integrity Staffing Solutions, Inc. v. Busk*, 713 F.3d 525 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 1490 (Mem.) (Mar. 3, 2014) (No. 13-433) (FLSA compensatory time for collective action).

5. 134 S. Ct. 870 (2014).

6. 134 S. Ct. 2550 (2014).

7. 134 S. Ct. 2618 (2014).

8. 134 S. Ct. 1158 (2014).

9. 134 S. Ct. 2369 (2014).

10. 134 S. Ct. 604 (2013).

11. 134 S. Ct. 2459 (2014).

12. 134 S. Ct. 2751 (2014).

13. 134 S. Ct. 1623 (2014).

14. 134 S. Ct. 1395 (2014).

15. *UNITE HERE Local 355 v. Mulhall*, 667 F.3d 1211 (11th Cir. 2012), *cert. improvidently granted per curiam*, 134 S. Ct. 594 (Dec. 10, 2013) (No. 12-9912-99); *Madigan v. Levin*, 692 F.3d 607 (7th Cir. 2012), *cert. improvidently granted per curiam*, 134 S. Ct. 2 (Oct. 15, 2013) (No. 12-872).

granted certiorari.¹⁶ As a result, the issue in that case—whether the government may impose criminal penalties against employers and unions that enter into neutrality agreements with respect to future labor organizing—will likely return to the Court in the near future.¹⁷

The authors of an empirical examination of Court decisions from 1946 to 2011 found that five of the current members of the Court are in the top ten of all justices who were “friendliest to business,” with Justice Samuel Alito and Chief Justice John Roberts being the two “most favorable to business.”¹⁸ As a result, the study’s authors concluded “that the Roberts Court is indeed highly pro-business—the conservatives extremely so and the liberals only moderately liberal.”¹⁹ In assessing this past term, one commentator mentioned that the Supreme Court generated “a remarkable record of unanimous rulings: nearly two-thirds of the [C]ourt’s 70 signed opinions.”²⁰ Nevertheless, the same commentator noted that some believe this unanimity was deceptive and have mockingly called it “fauxnanimity.”²¹ Justice Antonin Scalia led this attack, asserting that several “specious” unanimous decisions arose from unanimous agreement on a limited result with blistering concurring opinions questioning the majority’s rationale.²² A great number of the debates centered on different approaches to interpreting the meaning of words.²³ While this jurisprudential debate is not new, several labor and employment cases offered an opportunity

16. *Mulhall*, 134 S. Ct. at 594–95 (Breyer, J., dissenting, joined by Sotomayor, J., and Kagan, J.).

17. *See id.* at 595 (“Unless resolved, the differences among the Courts of Appeals could negatively affect the collective-bargaining process.”).

18. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1448–51, tbl.77 (2013) (study of Supreme Court justices).

19. *Id.* at 1449.

20. Marcia Coyle, *Small Steps, Major Consequences: The Supreme Court’s Rulings Could Undermine Key Precedents in Future*, NAT’L L.J., July 7, 2014, at 1.

21. Marcia Coyle, *Ginsburg on Rulings, Race: Justice Says Public Dismay About Congress Spills Over to High Court*, NAT’L L.J., Aug. 22, 2014, at 3 (the “fauxnanimity” criticism of some of the Court’s unanimous decisions during the 2013–14 term while also asking Justice Ginsburg about Justice Scalia’s claim of “‘specious’ unanimity” in a decision regarding buffering zones for abortion clinics and *Noel Canning*); Dahlia Lithwick, *Supreme Court Breakfast Table: The Justices Don’t Like Massachusetts’ Buffer Zones. But They’re Fine with the One Around the Supreme Court*, SLATE SUPREME COURT TABLE, June 26, 2014, at 1, 2 (“This morning, the Supreme Court handed down two unanimous decisions (I am inventing the word faux-nanimous effective immediately to account for [Justice] Scalia’s very dissent-y concurrences) in two of the most hotly contested cases of the term [and t]he first is *Canning*, the recess appointments case.”).

22. Linda Greenhouse, *Tragedy or Triumph*, N.Y. TIMES (Sept. 3, 2014), at 5, <http://www.nytimes.com/2014/09/04/opinion/tragedy-or-triumph.html> (A key example of this type of unanimous decision is *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), in which Justice Scalia, in reading his concurring opinion from the bench, “denounced the Court’s ‘judicial adventurism’ and made abundantly clear that this was a dissent in all but the most formal sense.”).

23. *See* discussion *infra* Part VI.

for members of the Court to flex their intellectual muscles while interpreting the intent and meaning of words.

This Article first addresses the Court's decisions of significance to organized labor. The Article next discusses the Court's review of whistle-blowing matters. It then describes the implications for employees and employers of employee benefits cases. The Article then reviews two cases regarding important, but tangential, concerns in labor and employment law even though those cases did not arise in the workplace context. To explore the common theme of false unanimity, this Article reviews both the unanimous components of the decisions as well as the justices' existing divisions, especially over different approaches to interpreting the meaning of words. Finally, the Article identifies the significance of the Supreme Court's 2013–14 labor and employment decisions and forecasts similar issues likely in store for the Court in the near future.

II. Organized Labor: Clothing Changes as Wages, Agency Recess Appointments, and Public Sector Union Fair Share Dues

Three cases addressed concerns of organized labor and employers who deal with organized labor. In *Sandifer*,²⁴ the Court explored a collective bargaining agreement that made time spent “changing clothes” noncompensable under federal wage and hour law.²⁵ In *Noel Canning*,²⁶ the president's ability to make a valid Senate-recess appointment of a National Labor Relations Board (NLRB) member represented an important issue, with respect to not only the Constitution, but also the viability of a major federal agency charged with protecting the rights of employees to engage in concerted and union activity. Finally, in *Harris*,²⁷ the Court examined the viability and enforcement of public sector labor laws that require unions to receive a “fair share” or agency fee from employees who choose not to join the union.²⁸ Another case, in which the Court decided it had improvidently granted review, had raised a labor issue likely to return to the Court.²⁹ A case scheduled for the 2014–15 term involves a labor and employee retirement benefits issue.³⁰ As a result, it appears

24. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014).

25. *Id.* at 880–81.

26. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

27. *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

28. *Id.* at 2658.

29. See *supra* note 16–17 and accompanying text (describing *UNITE HERE Local 355 v. Mulhall*, 667 F.3d 1211 (11th Cir. 2012), *cert. improvidently granted per curiam*, 134 S. Ct. 594 (Dec. 10, 2013) (No. 12-99), and how the issue is likely to come back to the Court).

30. *M&G Polymers USA, LLC v. Tackett*, 733 F.3d 589 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 2136 (Mem.) (May 5, 2014) (No. 13-1010).

that organized labor's legal concerns will be among the matters on the Court's extremely busy docket.

A. *Sandifer v. U.S. Steel Corp.*

In a decision involving the Fair Labor Standards Act of 1938 (FLSA),³¹ written by Justice Scalia and joined by Chief Justice Roberts and Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito, and Elena Kagan, the Court addressed the meaning of the phrase “changing clothes” in section 203(o) of the FLSA.³² The petitioners, current and former employees of U.S. Steel Corporation, filed a collective action seeking back pay for time spent donning and doffing protective gear while beginning or ending work.³³ Section 203(o) “allows parties to decide, as part of a collective-bargaining agreement, that ‘time spent in changing clothes . . . at the beginning or end of each workday’ is noncompensable.”³⁴ A 1949 amendment established “that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining” between an employer and a union representing its employees.³⁵

U.S. Steel conceded that it would have compensated employees for time spent donning and doffing protective gear if section 203(o) had not rendered that time noncompensable as part of a collective bargaining agreement covering the employees.³⁶ In contrast, the employees argued that the donning and doffing of the protective gear did not qualify as “changing clothes” pursuant to section 203(o).³⁷ As a result, the Court had to determine the meaning of “clothes” under section 203(o). The Court reviewed the dictionary definition of “clothes” at the time Congress enacted the provision and decided that “clothes” had the ordinary meaning of “items that are both designed and used to cover the body and are commonly regarded as articles of dress.”³⁸

The Court rejected the employees' claim that the definition of “clothes” excluded “items designed and used to protect against workplace hazards” because Webster's dictionary during that period provided that clothes are for comfort.³⁹ The Court explained that

31. 29 U.S.C. §§ 201–219 (2012).

32. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 873–74, n.7 (2014) (Justice Sotomayor joined the opinion except with respect to footnote 7, in which the Court stated that although “exemptions . . . are to be narrowly construed against the employers seeking to assert them,” this “narrow-construction principle” does not apply to the definition provision of FLSA § 203).

33. *Id.* at 874 n.1.

34. *Id.* at 874 (quoting 29 U.S.C. § 203(o)).

35. *Id.* at 876.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 877.

“‘protection’ and ‘comfort’ are not incompatible, and are often synonymous.”⁴⁰

Further, the Court determined that an attempt to distinguish “items designed and used to protect against workplace hazards” from the definition of clothes would turn the purpose of section 203(o) to “nothingness” because the clothes at issue must be integral to job performance.⁴¹ Also, the application of this purported distinction for safety items “abandons the assertion that clothes are for decency or comfort.”⁴² The Court acknowledged that the meaning of “clothes” under section 203(o) of the FLSA does “not embrace . . . essentially anything worn on the body” as there are some “wearable items that are not clothes, such as some equipment and devices.”⁴³

The Court also analyzed “changing” to assess whether adding layers or putting on additional clothes constituted changing if the original clothes remained. The Court found that “despite the usual meaning of ‘changing clothes,’ the broader statutory context makes it plain that ‘time spent in changing clothes’ includes time spent in altering dress.”⁴⁴ Further, if the purpose of section 203(o) was “to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation,” then “changing” could not be limited to just “substituting.”⁴⁵

The Court applied its definition of clothes to the following twelve items raised by the employees: “a flame-retardant jacket, pair of pants and hood; a hardhat; a snood; wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator.”⁴⁶ The Court found that the first nine items were “clearly . . . designed and used to cover the body and are commonly regarded as articles of dress.”⁴⁷ The glasses and earplugs were not usually considered articles of dress even if they have a covering function.⁴⁸ Also, a respirator does not have a covering function; nor can it be considered an article of dress.⁴⁹ As a result, these three items—glasses, earplugs, and respirators—were not clothes under section 203(o).⁵⁰

However, the *Sandifer* Court concluded that time spent donning and doffing safety glasses and ear plugs was “minimal.”⁵¹ If the

40. *Id.* (the Court identified gloves as an example of an item that protects a person from scrapes and cuts while also enhancing a person’s comfort).

41. *Id.*

42. *Id.*

43. *Id.* at 878; *see also id.* at n.6 (description of a “wristwatch”).

44. *Id.* at 879.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 880.

49. *Id.*

50. *Id.*

51. *Id.* at 881.

majority of time was spent “changing clothes” as defined under section 203(o), the entire time, even time spent donning and doffing nonclothes items such as safety glasses and ear plugs, was still time spent “changing clothes.”⁵² The Court, on the other hand, specifically mentioned that if the majority of time is spent putting on and taking off nonclothes items, the time would not qualify as “time spent in changing clothes” and would not be negotiable as noncompensable under section 203(o).⁵³

With respect to respirators, employees used them only as needed throughout the normal workday.⁵⁴ Consequently, section 203(o) did not cover respirator usage here as a preliminary or postliminary subject covered by section 203(o).⁵⁵ Thus, the Court affirmed the Seventh Circuit decision approving summary judgment for the employer because (1) under section 203(o) the employer and union had negotiated the time spent putting on and taking off the nine clothes items as noncompensable pursuant to a collective bargaining agreement,⁵⁶ (2) the time spent putting on and taking off nonclothes items at the beginning and end of workdays was minimal and subsumed by the time spent changing the nine clothes items,⁵⁷ and (3) section 203(o) did not cover the time spent putting on respirators as it did not occur during the beginning or end of the workday.⁵⁸

B. NLRB v. Noel Canning

In *Noel Canning*, the Court determined whether President Barack Obama validly appointed three NLRB members during a three-day adjournment of the Senate pursuant to the Recess Appointments Clause of the Constitution.⁵⁹ That clause states the president has the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”⁶⁰ The Court first addressed whether the words “Recess of the Senate” referred only to an intersession recess or also to an intrasession recess.⁶¹ There was no dispute whether the clause applied during intersession recesses.⁶² However, the Court held that the clause applied to both an intersession recess and an “intra-session recess of substantial length.”⁶³

52. *Id.*

53. *Id.*

54. *Id.* at 873.

55. *Id.* at 881.

56. *Id.* at 880–81.

57. *Id.* at 874.

58. *Id.* at 881.

59. NLRB v. Noel Canning, 134 S. Ct. 2550, 2552 (2014).

60. U.S. CONST., art. II, § 2, cl. 3.

61. *Noel Canning*, 134 S. Ct. at 2556 (discussing U.S. CONST., art. II, § 2, cl. 3).

62. *Id.* at 2561.

63. *Id.*

The Court discussed the meaning of the word “recess” at the time of the Constitution’s drafting and decided that “[t]he Founders themselves used the word to refer to intra-session, as well as to intersession, breaks.”⁶⁴ The Court also noted that even “though the 40th Congress impeached President [Andrew] Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments.”⁶⁵ The Court then acknowledged the pragmatic implications of its holding: “if we include military appointments, Presidents have made thousands of intra-session recess appointments” throughout the Recess Appointments Clause’s existence.⁶⁶

The Court addressed three arguments the parties raised. The first argument was that the founders did not intend to apply the Recess Appointments Clause to anything but intersession recesses as they “hardly knew any other” type of recess.⁶⁷ The Court concluded that “[t]he Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries” because “a Constitution is ‘intended to endure for ages to come,’ and must adapt itself to a future that can only be ‘seen dimly,’ if at all.”⁶⁸

The second argument challenging the NLRB appointments was that allowing intrasession appointments would make the length of those appointments illogical.⁶⁹ The Court rejected this argument as well and noted how long it normally takes to appoint someone even when the Senate is actively in session.⁷⁰

The third argument challenging the appointments was that including intrasession recesses would make the Recess Appointments Clause vague.⁷¹ The Court responded, “One can find problems of uncertainty, however, either way” and described examples of how uncertainty could also occur during intersession breaks.⁷²

As a result, the Court decided that both intrasession and intersession recesses are included within the Clause’s coverage.⁷³ The Court limited its holding, finding that the language regarding “[v]acancies that may happen during the recess of the Senate” means only vacancies that occur during the recess or before the recess.⁷⁴ The words “may happen” helped convince the Court to also include vacancies

64. *Id.*

65. *Id.* at 2562.

66. *Id.*

67. *Id.* at 2564.

68. *Id.* at 2565.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2567.

74. *Id.*

that occurred before the recess instead of a narrower reading limited to just vacancies during the recess.⁷⁵ While ordinarily meaning “to originate,” the Court found that the words “may happen” also meant the “chance to be.”⁷⁶

The Court then addressed the concern that under its broad reading of the clause, as opposed to the narrower interpretation that Justice Scalia posed,⁷⁷ the president could completely circumvent the Senate’s role in the appointment process.⁷⁸ The Court determined that because “both interpretations carry with them some risk of undesirable consequences, . . . the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often.”⁷⁹ According to the Court, the narrower interpretation would also prevent the president from making “any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”⁸⁰

In finding the Recess Appointments Clause ambiguous, the Court decided it would not “upset the compromises and working arrangements” of prior presidents and Senates who established a common historical practice of making appointments for recesses lasting at least ten or more days.⁸¹ The Court held that, “for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business” and “[t]he Senate met that standard here.”⁸²

The Court also considered if a specific break was still part of a session or a recess and, if it was a recess, whether it was sufficiently long for the NLRB appointments in *Noel Canning* to be valid.⁸³ The Court concluded that the Senate’s pro forma gatherings at issue in the case were part of a session, not a recess.⁸⁴ Nevertheless, the Court found that a recess of four to nine days is “presumptively too short” to create an opening for the president to make an appointment and a recess of three days or fewer is absolutely too short for a constitutionally valid appointment.⁸⁵ As a result, the Court deemed the three-day break between pro forma sessions in *Noel Canning* too short to give the

75. *Id.*

76. *Id.* at 2568.

77. *See id.* at 2606.

78. *Id.* at 2569.

79. *Id.*

80. *Id.* at 2569–70.

81. *Id.* at 2553, 2560.

82. *Id.* at 2574.

83. *Id.* at 2573.

84. *Id.* at 2575.

85. *Id.* at 2566–67, 2599.

president the constitutional authority to make the NLRB member recess appointments at issue.⁸⁶

In concurring, Justice Scalia agreed that the president did not have the authority to appoint the NLRB members, but nonetheless vehemently criticized the majority's textual interpretation of the Recess Appointments Clause.⁸⁷ According to Justice Scalia, the only appointments available to the president under the clause must have arisen during an intersession and the appointment had to be made during that intersession.⁸⁸ Specifically, Justice Scalia stated that "[w]hat the majority needs to sustain its judgment is an ambiguous text and a clear historical practice" when "[w]hat it has is a clear text and an at-best-ambiguous historical practice."⁸⁹ Because Justice Scalia found the words "[r]ecess" and "happens" to be clear, he vigorously asserted that the Court's interpretation allowing intrasession appointments was incorrect even if the Court agreed unanimously about the judgment.⁹⁰

C. *Harris v. Quinn*

In a five-four decision by Justice Alito, *Harris* addressed "whether the First Amendment permits a State to compel [in-home,] personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support."⁹¹ The Court held that the First Amendment did not permit this state action.⁹² The Court first explained the employment structure for in-home personal care providers who visit disabled individuals through Medicaid-waiver programs of the Illinois Department of Human Services.⁹³ The disabled person, the "customer," employs those personal care providers.⁹⁴ The Court held that the customer, as the employer, maintains control over the relationship and decides what services the provider delivers

86. *Id.* at 2574.

87. *See id.* at 2592–618.

88. *Id.* at 2605.

89. *Id.* at 2617.

90. *Id.* at 2595, 2606. Justice Scalia's concerns about the broader application of the Court's analysis in *Noel Canning* were highlighted recently in a D.C. Circuit case challenging the appointment of NLRB Member Craig Becker by President Obama on March 17, 2010, during an intrasession recess of seventeen days. *See Matthew Enter, Inc. v. NLRB*, 771 F.3d 812, 813–14 (D.C. Cir. 2014) (Member Becker's appointment was valid under *Noel Canning*, which suggested that a recess of more than ten days was constitutionally valid); *see also Gestamp S.C., LLC v. NLRB*, 769 F.3d 254, 257 (4th Cir. 2014) (appointment of NLRB Member Becker was constitutionally valid under *Noel Canning*); *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1200–01 (10th Cir. 2014) (same).

91. *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014).

92. *Id.*

93. *See id.* at 2624.

94. *Id.*

as the government only pays the provider and establishes minimum employment requirements.⁹⁵

Illinois classified personal care providers as “‘public employees’ of the State of Illinois—but [s]olely for the purposes of coverage under the Illinois Public Labor Relations Act.’”⁹⁶ This allowed the union representing these employees to charge a “fair share” or agency fee under Illinois law to help pay for the cost of certain union representational activities.⁹⁷ A union must fairly represent all members of a bargaining unit including those who choose not to join and never pay full membership dues.⁹⁸ In requiring a fair share payment, the state law prevents “free riders” from reaping the benefit of unionization without contributing to the costs.⁹⁹ According to the Court, the “personal assistants” in *Harris* were “not state employees for any other purpose, ‘including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits.’”¹⁰⁰

Beyond finding that these employees were not public sector workers, the Court went further to question on First Amendment grounds its prior endorsement of fair share payments for public sector workers. The Court had previously acknowledged the “free-rider” problem in its 1977 decision in *Abood v. Detroit Board of Education*.¹⁰¹ As *Abood* noted, if nonmembers are not required to pay union fees, employees will choose to be nonmembers for economic reasons while still reaping the benefits from the work the union performs for all employees.¹⁰²

In *Harris*, the Court decided that a ruling in favor of Illinois would be a “very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others deemed public employees solely for the purpose of unionization and collection of an agency fee.”¹⁰³ The Court discussed at length its “fair share” analysis since *Abood*. In the end, the Court distinguished *Harris* from *Abood* because “*Abood* . . . has clear boundaries; it applies to public employees.”¹⁰⁴ According to the Court, “[e]xtending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems.”¹⁰⁵

The Court also addressed the issue from the perspective of its most recent public sector labor decision, *Knox v. Service Employees*

95. *Id.* at 2624–25.

96. *Id.* at 2626.

97. *Id.*

98. *Id.* at 2656.

99. *Id.* at 2627.

100. *Id.* at 2626.

101. *Id.* at 2627 (citing *Abood v. Detroit Bd. of Educ.*, 97 S. Ct. 1782 (1977)).

102. *Id.*

103. *Id.*

104. *Id.* at 2638.

105. *Id.*

International Union, Local 1000,¹⁰⁶ in which it had applied the compelling state interest test to assess whether a government entity could restrict an individual's First Amendment rights by requiring payment of an agency fee for union representation.¹⁰⁷ The Court did not find any compelling state interest to justify the fair share provision in *Harris*.¹⁰⁸ Nothing in the record showed that the personal assistants could not obtain similar benefits to those who voluntarily chose to pay dues.¹⁰⁹

The Court considered applying a balancing test from *Pickering v. Board of Education*.¹¹⁰ While the Court asserted that the *Pickering* balancing test did not apply to the circumstances,¹¹¹ the Court held that Illinois's actions would not pass that test in any event because the balance favored First Amendment protection for the personal assistants.¹¹²

Justice Kagan, in dissent, thought this case fell squarely within the perimeter of *Abood*.¹¹³ She asserted that “[t]he idea that *Abood* applies only if a union can bargain with the State over every issue [as opposed to the control that the patient has in deciding terms] comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.”¹¹⁴ Justice Kagan also observed that while the petitioners sought to overturn more than thirty years of sound precedent in *Abood*, “[t]he good news out of this case is clear: The majority declined that radical request.”¹¹⁵

According to Justice Kagan, “[t]he true issue is whether Illinois has a sufficient stake in, and control over, the petitioners’ terms and conditions of employment to implicate *Abood*’s rationales and trigger its application.”¹¹⁶ However, “[t]he bad news is just as simple: The majority robbed Illinois of that choice in administering its in-home care program.”¹¹⁷ In closing, Justice Kagan stated: “The majority today misapplies *Abood*, which properly should control this case” as “[n]othing separates, for purposes of that decision, Illinois’s personal assistants from any other public employee.”¹¹⁸

106. 132 S. Ct. 2277 (2012).

107. *Harris*, 134 S. Ct. at 2639 (citing *Knox*, 132 S. Ct. at 2289).

108. *Id.* at 2639–40.

109. *Id.* at 2640–41.

110. 391 U.S. 563 (1968).

111. *Harris*, 134 S. Ct. at 2641–42.

112. *Id.*

113. *Id.* at 2645 (Kagan, J., dissenting).

114. *Id.* at 2650.

115. *Id.* at 2658.

116. *Id.* at 2649.

117. *Id.* at 2658.

118. *Id.*

III. Whistleblowing: Sarbanes-Oxley Private Subcontractors and Public Sector Testimony

Whistleblower cases have become a recurring part of the Court's docket. Two were considered during the 2013–14 term. One case, *Lawson*,¹¹⁹ addressed the scope of coverage for employees of private subcontractors of publicly traded companies covered by the Sarbanes-Oxley Act.¹²⁰ Another case, *Lane*,¹²¹ examined whether the First Amendment protects public sector employees terminated for providing whistleblowing testimony in court.¹²² Another whistleblower case, *MacLean*,¹²³ is part of the Court's docket for the 2014–15 term.

A. *Lawson v. FMR LLC*

In *Lawson*, Justice Ginsburg's six-three decision reviewed the scope of coverage under the Sarbanes-Oxley Act (SOX)¹²⁴ section 1514A, which provides employee whistleblower protection to deter fraudulent financial disclosures regarding publicly traded companies.¹²⁵ In deciding whether statutory whistleblower protection under SOX only extended to employees of publicly traded companies, and not subcontractor employees, the Court found that section 1514A "shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors."¹²⁶

The Court examined the statute's purpose and motivation. The Court stated that "Congress identified the lack of whistleblower protection as 'a significant deficiency' in the law."¹²⁷ The two *Lawson* plaintiffs worked for separate private companies that provided advisory and management services to Fidelity, a publicly traded company.¹²⁸ Fidelity had no employees and instead contracted with outside companies to handle day-to-day operations.¹²⁹

The main issue was whether section 1514A—which provides whistleblower protection to employees of publicly traded companies "or any officer, employee, contractor, subcontractor, or agent of such

119. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

120. *Id.* at 1159.

121. *Lane v. Franks*, 134 S. Ct. 2369 (2014).

122. *Id.* at 2377.

123. *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301, 1304 (Fed. Cir. 2013), *cert. granted*, 82 U.S.L.W. 3470 (U.S. May 19, 2014) (No. 13-894) (whether federal air marshal's claim of making a protected communication to a reporter under the federal Whistleblower Protection Act exists if the communication involved disclosure of sensitive security information specifically prohibited by law).

124. Pub. L. No. 107-204, 116 Stat. 745 (2002).

125. 18 U.S.C. § 1514A (2012).

126. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

127. *Id.* at 1162–63.

128. *Id.* at 1164.

129. *Id.*

company”—protected whistleblower employees of the outside companies.¹³⁰ The Court advanced several reasons for its decision. First, the Department of Labor’s Arbitration Review Board (ARB), in an unrelated opinion issued after *Lawson* was heard at the appellate level, held that section “1514A affords whistleblower protection to employees of privately-held contractors that render services to public companies.”¹³¹

Second, the Court analyzed the statute’s language and found that “FMR’s interpretation of the text requires insertion of ‘of a public company’ after an employee” when the statute’s relevant portion reads “no . . . contractor . . . may discharge . . . an employee.”¹³² The Court pointed out that FMR’s argument did not make sense because contractors would not have authority over the public company’s employees.¹³³ The Court decided that the plain language means “[a] contractor may not retaliate against its own employee for engaging in protected whistleblowing.”¹³⁴ The employer argued that the statute referred only to contractors in an “ax-wielder” position with the only responsibility being to discharge employees.¹³⁵ The Court rejected this argument, stating that even if an ax-wielder did the actual firing, the public company would still be the entity retaliating.¹³⁶

The employer also raised two textual arguments. First, “[i]f . . . ‘an employee’ includes employees of contractors, then grammatically, the term also includes employees of public company officers and employees.”¹³⁷ The Court found this was an unlikely hypothetical problem as housekeepers and gardeners and other personal employees of public company officers and employees were unlikely to become aware of evidence of their employer’s fraud involving a SOX whistleblower claim.¹³⁸ Second, the employer argued that the statutory language’s heading only referred to publicly traded companies.¹³⁹ However, the Court noted that “the headings here are ‘but a short-hand reference to the general subject matter’ of the provision” and were “not meant to take the place of the detailed provisions of the text.”¹⁴⁰

Although it determined that the plain language was not ambiguous, the Court still discussed the statutory intent revealed in the

130. *Id.* at 1163.

131. *Id.* at 1165.

132. *Id.*

133. *Id.* at 1166.

134. *Id.*

135. *Id.* (using a character from the movie UP IN THE AIR, played by actor George Clooney as an example of such an “ax-wielder”).

136. *Id.*

137. *Id.* at 1168.

138. *Id.*

139. *Id.* at 1169.

140. *Id.*

legislative history.¹⁴¹ The Court reasoned that if the statute was read as FMR and the dissent suggested, there would be a hole in the protection offered. All public companies would have to do to avoid SOX liability is hire private contracted companies to perform their work and those employees would not have the whistleblower protection provided by section 1514A.¹⁴² The Court also discussed the legislative reasoning for SOX and concluded that Congress enacted section 1514A to “ward off another Enron debacle.”¹⁴³ According to the Court, in enacting SOX Congress was just as “focused on the role of Enron’s outside contractors in facilitating the fraud as it was on the actions of Enron’s own officers.”¹⁴⁴

The Court also compared section 1514A to another whistleblower statute, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),¹⁴⁵ that has similar language stating that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee.”¹⁴⁶ The Court also found that “[t]he ARB has consistently construed AIR 21 to cover contractor employees.”¹⁴⁷ Due to the “parallel text,” the Court interpreted the two provisions consistently because section 1514A was modeled on AIR 21.¹⁴⁸ The Court held that whistleblower protection under SOX extends to employees of contractors and subcontractors.¹⁴⁹

B. Lane v. Franks

In *Lane*, Justice Sonia Sotomayor’s unanimous opinion considered whether the First Amendment protected a public employee who provided truthful sworn testimony in court when a subpoena compelled the testimony and giving the testimony was outside the employee’s regular job duties.¹⁵⁰ The Court decided that the employee’s testimony was protected speech.¹⁵¹ In *Lane*, a community college president, Franks, fired Lane, a director for the college, in retaliation for testimony Lane gave against a former employee and political appointee, Schmitz, during Schmitz’s trial for mail fraud and theft. Lane had fired Schmitz before the trial when he discovered that Schmitz had been receiving compensation for a job she never performed, and Lane was asked to testify at Schmitz’s trial about his reasoning for terminating Schmitz.¹⁵²

141. *Id.* at 1169–71.

142. *Id.* at 1182.

143. *Id.* at 1169.

144. *Id.*

145. 49 U.S.C. § 42121(a) (2012).

146. *Lawson*, 134 S. Ct. at 1175.

147. *Id.*

148. *Id.* at 1176.

149. *Id.*

150. *Lane v. Franks*, 134 S. Ct. 2369, 2374–75 (2014).

151. *Id.* at 2375.

152. *Id.*

The Court used a two-step inquiry from *Garcetti v. Ceballos*¹⁵³ and *Pickering v. Board of Education*¹⁵⁴ to determine if the government's interest outweighed the employee's interest as a citizen and if the employee was entitled to First Amendment protection.¹⁵⁵ The two-step inquiry from *Garcetti* is (1) "whether the employee spoke as a citizen on a matter of public concern"¹⁵⁶ and (2) "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."¹⁵⁷

The Court concluded that Lane met the first step by speaking as a citizen.¹⁵⁸ The Court explained: "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."¹⁵⁹ In response to the argument that the employee's speech was different because it concerned information learned from his job duties, the Court pointed out that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."¹⁶⁰

Speech based on information learned on the job can make a difference in *Pickering* balancing, but the Court decided that "[t]he importance of public employee speech is especially evident in the context of this case: a public corruption scandal."¹⁶¹ Further, "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim."¹⁶² For these reasons, the Court determined that the employee's testimony was speech as a citizen on a matter of public concern.¹⁶³

For the inquiry's second step, the Court used the *Pickering* balancing test.¹⁶⁴ That test "requires 'balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁶⁵ The Court determined that,

153. 547 U.S. 410 (2006).

154. 391 U.S. 563 (1968).

155. *Lane*, 134 S. Ct. at 2377–78.

156. *Id.* at 2378.

157. *Id.*

158. *Id.*

159. *Id.* at 2379.

160. *Id.*

161. *Id.* at 2380.

162. *Id.*

163. *Id.*

164. *Id.* at 2381.

165. *Id.* at 2377.

[h]ere, the employer’s side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane’s testimony at Schmitz’ trial was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.¹⁶⁶

As a result, the Court held the speech protected.¹⁶⁷

The Court agreed that Franks was protected by qualified immunity for the claims against him in his individual capacity because of ambiguity regarding the application of *Garcetti* to assess Franks’s actions.¹⁶⁸ With qualified immunity, “courts may not award damages against a government official in his personal capacity unless ‘the official violated a statutory or constitutional right,’ and ‘the right was ‘clearly established’ at time of the challenged conduct.’”¹⁶⁹

Justice Thomas’s succinct concurring opinion, in which Justices Scalia and Alito joined, identified situations in which an employee could testify as a part of job duties under the *Garcetti* inquiry’s first step, including testimony by police officers and laboratory analysts.¹⁷⁰ Nevertheless, the concurring opinion concluded that there was no reason to address these constitutional questions and stated that the Court’s opinion “leaves the constitutional questions raised by these scenarios for another day.”¹⁷¹

IV. Benefits: Plan Statute of Limitations, Presumptions of Ordinary Prudence in Company Investments, and Religious Objections to Contraceptive Coverage

For good or ill, issues involving employee benefits under the Employee Retirement Income Security Act of 1974 (ERISA)¹⁷² continue to receive substantial attention from the Supreme Court.¹⁷³ The Court’s influence on employee benefits is likely to persist as new issues arise under the Patient Protection and Affordable Care Act (ACA)¹⁷⁴ and debates occur about that statute’s meaning and impact.¹⁷⁵ Cases decided

166. *Id.* at 2381.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 2384 (Thomas, J., concurring).

171. *Id.*

172. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001–1461 (2012)).

173. See Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 159–65 (2009) (an ongoing debate about employee benefit law interpretations by the Supreme Court regarding the choice between a more focused remedial approach and a majority-based approach).

174. Pub. L. No. 111-148, 124 Stat. 119 (2010).

175. See Brendan S. Maher, *The Affordable Care Act, Remedy and Litigation Reform*, 63 AM. U. L. REV. 649, 651–52 (2014) (the ACA “rewrote the law of private health

during the 2013–14 term further demonstrated the importance of employee benefits under ERISA and the ACA’s burgeoning impact.

A. *Heimeshoff v. Hartford Life*

In *Heimeshoff*, Justice Thomas’s unanimous opinion addressed the plaintiff’s ERISA claim arising from denial of long-term disability benefits under a plan administered by Hartford.¹⁷⁶ Heimeshoff, a Walmart manager, developed lupus and fibromyalgia.¹⁷⁷ Hartford denied her claim for disability and, after exhaustion of agency procedures, Heimeshoff sued in federal court.¹⁷⁸

There is no statute of limitations defined under ERISA for Heimeshoff’s claim, but the employee’s benefit plan provided a three-year limitation from the time written proof of loss was required to be furnished.¹⁷⁹ Because the plan’s limitation period was over by the time the ERISA court claim was filed, Heimeshoff argued that a limitation period should not be applied unless the “statutes of limitations commence upon accrual of the cause of action.”¹⁸⁰ The Court rejected that argument.¹⁸¹ The Court held that parties may contract to a limitation and a court “must give effect to the Plan’s limitations provisions unless we determine either that the period is unreasonably short, or that a ‘controlling statute’ prevents the limitations provision from taking effect.”¹⁸²

Neither party had argued that the limitations period was unreasonably short. Further, the statute of limitations in the plan did not undermine the two-tiered remedial scheme requiring exhaustion of plan remedies before pursuing court remedies under ERISA.¹⁸³ If the deadline had been set in bad faith, courts could have heard the case because bad faith is an allowable basis to challenge a plan’s limitations period.¹⁸⁴ Also, in appropriate cases, a party may assert equitable defenses, such as waiver, estoppel, and tolling, to address any concerns about enforcing the plan’s statute of limitations.¹⁸⁵

B. *Fifth Third Bancorp v. Dudenhoeffer*

In *Dudenhoeffer*, Justice Breyer’s unanimous opinion considered former employees’ claims that the employee stock option plan

insurance in America” and the author “predicts a series of flashpoints over which litigation reform battles will be fought”).

176. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 608–09 (2013).

177. *Id.* at 608.

178. *Id.* at 609.

179. *Id.* at 609–10.

180. *Id.* at 610.

181. *Id.*

182. *Id.* at 612.

183. *Id.* at 613.

184. *Id.* at 614.

185. *Id.* at 615–16.

(ESOP) fiduciary had violated ERISA's duty of prudence by continuing to invest in company stock purportedly known to be devaluing.¹⁸⁶ Specifically, the Court addressed "when an ESOP fiduciary's decision to buy or hold the employer's stock is challenged in court, [whether] the fiduciary is entitled to a defense-friendly standard that the lower courts have called a 'presumption of prudence.'"¹⁸⁷

The Court considered four of the employer's arguments.¹⁸⁸ "First, petitioners argue that the special purpose of an ESOP—investing participants' savings in stock of their employer—calls for a presumption that such investments are prudent."¹⁸⁹ The Court responded by pointing out that "[section 1104(a)(1)(D) of ERISA] makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary."¹⁹⁰ Second, the employer argued that the duty of prudence should be read in light of trust law under which "the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument."¹⁹¹ The Court disagreed, concluding that "trust documents cannot excuse trustees from their duties under ERISA."¹⁹²

The employer's third argument asserted that, without the prudence standard, fiduciaries could be seen as engaging in unlawful insider trading.¹⁹³ The Court held that that there was no distinction between fiduciaries in this situation and any other, and that ERISA surely cannot require the breaking of insider trading laws.¹⁹⁴ The Court further explained:

To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.¹⁹⁵

The employer also argued that "without some sort of special presumption, the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOP's to their employees, contrary to the stated intent of Congress."¹⁹⁶ The Court rejected this argument,

186. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2463 (2014).

187. *Id.*

188. *Id.* at 2467.

189. *Id.*

190. *Id.* at 2468.

191. *Id.* at 2469.

192. *Id.*

193. *Id.*

194. *Id.* at 2469–70.

195. *Id.* at 2472.

196. *Id.* at 2471.

stating, “we do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite ‘balancing.’”¹⁹⁷

According to the Court, “[t]he proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances.”¹⁹⁸ The Court further explained that a motion to dismiss for failure to state a claim would be the more appropriate approach to address the plan’s concerns.¹⁹⁹ The Court vacated the court of appeals decision and remanded the case because the plaintiff’s alternate options for the fiduciaries’ investments may not have been plausible.²⁰⁰ Finally, the Court held that, on remand, the motion to dismiss standard should apply.²⁰¹

C. *Burwell v. Hobby Lobby Stores, Inc.*

In *Hobby Lobby*—a five-four opinion by Justice Alito—three closely held corporations brought claims under both the Religious Freedom Restoration Act of 1993 (RFRA)²⁰² and the First Amendment.²⁰³ The companies’ owners believed that the ACA regulations, as the Department of Health and Human Services (HHS) interpreted them, violated their sincerely held religious beliefs by mandating that they provide employees with coverage for four types of contraceptives that operate after conception.²⁰⁴ The Court held these ACA mandates violated the RFRA because they substantially burdened the claimants’ exercise of religion and did not provide the least restrictive means to accomplish the ACA’s goals.²⁰⁵

The Court first considered whether the companies could bring a claim under RFRA.²⁰⁶ The government argued that companies could not bring their claims for several reasons: corporations are not “persons” under the RFRA, corporations cannot “exercise religion,” and it is hard to ascertain the sincerely held “beliefs” of a corporation.²⁰⁷ Nevertheless, the Court concluded that corporations are “persons” under the RFRA by looking at the Dictionary Act²⁰⁸ definition of a person.²⁰⁹ The Court then noted that the government conceded that

197. *Id.* at 2470.

198. *Id.*

199. *Id.* at 2471.

200. *Id.*

201. *Id.*

202. 42 U.S.C. §§ 2000bb to bb-4 (2012).

203. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2765 (2014).

204. *Id.* at 2759, 2766.

205. *Id.* at 2759–60.

206. *Id.* at 2767.

207. *Id.* at 2769–74.

208. 1 U.S.C. § 1 (2012).

209. *Burwell*, 134 S. Ct. at 2768.

nonprofit corporations can exercise religion and there was no reason to draw a line between nonprofits and for-profits because “[n]ot all corporations that decline to organize as nonprofits do so in order to maximize profits.”²¹⁰ Also, the Court identified various reasons why a company may not organize as a nonprofit organization, including the need to lobby for legislation.²¹¹ The Court noted: “It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected.”²¹²

According to Justice Alito, “[i]f Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.”²¹³ Finally, when addressing the difficulty of assessing the sincerity of beliefs of corporations, the Court explained: “If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA’s reach out of concern for the seemingly less difficult task of doing the same in corporate cases.”²¹⁴ Also, the Court suggested that if multiple owners have disputes about their religious beliefs on a particular matter, “[s]tate corporate law provides a ready means for resolving” how management conflicts should be addressed.²¹⁵

The Court next analyzed whether the HHS regulations substantially burdened the companies’ religious beliefs. The Court held the HHS regulations did substantially burden the companies because they either have to “engage in conduct that seriously violates their religious beliefs,” “be taxed \$100 per day for each affected individual,” or pay a penalty of “\$2000 per employee [who qualifies for a subsidy on a government-run exchange] each year” if they decide not to provide any coverage at all.²¹⁶

Although the government argued for the first time that the \$2000 penalty would be less-costly than offering insurance, the Court was not persuaded and stated that “it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.”²¹⁷ The Court also explained: “We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.”²¹⁸

210. *Id.* at 2771.

211. *Id.*

212. *Id.* at 2773.

213. *Id.* at 2773–74.

214. *Id.* at 2774.

215. *Id.* at 2775.

216. *Id.* at 2775–76.

217. *Id.* at 2777.

218. *Id.*

Next, the Court analyzed whether the government had shown that the contraceptive “mandate both ‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’”²¹⁹ The Court specified that the RFRA required that the government have a compelling interest for “application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”²²⁰ The Court found it unnecessary to decide whether the government’s interests in promoting “public health” and “gender equality” were compelling.²²¹ The Court assumed that there was a compelling interest in “guaranteeing cost-free access to the four challenged contraceptive methods.”²²²

As a result, the Court turned to the least restrictive means analysis and held that the government did not satisfy the standard.²²³ The Court suggested a less restrictive alternative in which the government is responsible for the cost of providing contraceptives so that there is still no cost sharing for the employees.²²⁴ The Court rejected the government’s “view that RFRA can never require the Government to spend even a small amount” because that approach “reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.”²²⁵

The Court also pointed out that the government “has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs” because the government “has already established an accommodation for nonprofit organizations with religious objections.”²²⁶ This accommodation allows the “organization’s insurance issuer or third-party administrator” to remove contraceptive coverage from the group health insurance plan and provide separate payments for contraceptive services without employer involvement in any cost-sharing.²²⁷ According to Justice Alito, the dissenters identified no reason “why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate” because “there is none.”²²⁸

Finally, the Court addressed Justice Ginsberg’s dissent that asserted the majority’s decision will open up the floodgates to “religious

219. *Id.* at 2779 (quoting RFRA, 42 U.S.C. § 2000bb-1(b) (2012)).

220. *Id.* (internal citation omitted).

221. *Id.*

222. *Id.* at 2780.

223. *Id.*

224. *Id.*

225. *Id.* at 2781.

226. *Id.* at 2782 & n.41.

227. *Id.*

228. *Id.*

objections regarding a wide variety of medical procedures and drugs.”²²⁹ In response, the Court described its decision as narrow and stated that it “should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs . . . [given that] other coverage requirements, such as immunizations, may be supported by different interests . . . and may involve different arguments about the least restrictive means of providing them.”²³⁰ The Court also concluded that there was no evidence of current insurance policies that exclude the other types of medical procedures the dissenting opinion suggested companies will attempt to exempt such as blood transfusions and vaccines.²³¹ Because the Court held that the contraceptive mandate violated the RFRA, it did not reach the First Amendment claim.²³²

Justice Ginsburg’s dissent stated: “In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”²³³ Justice Ginsburg noted that, when addressing less restrictive alternatives, the Court suggested that instead of “tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.”²³⁴ The dissent maintained that “Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.”²³⁵ According to Justice Ginsburg, the religious-based exemption for companies impinges on the interests of third parties who do not share their religious view, “the thousands of women employed by” them, and the “dependents of persons those corporations employ.”²³⁶

Justice Ginsburg asserted that the Court also failed to inquire adequately into the “substantial” aspects of the burden placed on the companies’ exercise of religious beliefs.²³⁷ Instead, Justice Ginsburg would have found that the effect on the employer is “too attenuated to rank as substantial” because the companies need not purchase contraceptives and only have to place funds in the plans that would cover this benefit along with other benefits.²³⁸ In closing, the dissent stated: “The Court, I fear, has ventured into a minefield” by not confining its

229. *Id.* at 2783.

230. *Id.*

231. *Id.*

232. *Id.* at 2785.

233. *Id.* at 2787 (Ginsburg, J., dissenting).

234. *Id.*

235. *Id.* at 2789–90.

236. *Id.* at 2787.

237. *Id.* at 2798.

238. *Id.* at 2799.

religious-based exemption under RFRA to only those “organizations formed ‘for a religious purpose.’”²³⁹

V. Tangential Employment Matters: Affirmative Action and Taxation of Severance Payments

Two cases decided in the 2013–14 term are of interest to employers and employees even though the disputes did not involve claims in which employees squared off against employers. The issues of affirmative action in a state ballot initiative regarding college admissions in *Schuette* is merely a step away from the issue of affirmative action in the workplace, a major concern for our increasingly diverse society.²⁴⁰ Also, *Quality Stores* provides a unique understanding of a tax issue affecting handling of severance arrangements. Thus, *Schuette* and *Quality Stores* offer some legal guidance for labor and employment practitioners.

A. *Schuette v. Coalition to Defend Affirmative Action*

In *Schuette*, the Court decided the constitutionality of a Michigan constitutional amendment—that arose from a voter referendum—prohibiting affirmative action and the consideration of race during the admissions process of state universities.²⁴¹ Justice Kennedy, in a plurality opinion joined by Chief Justice Roberts and Justice Alito, found that the law was constitutional because “there is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”²⁴² Justice Kennedy emphasized that this case “is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education . . . but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”²⁴³

Justice Scalia’s concurring opinion, joined by Justice Thomas, maintained the state law did not offend the Fourteenth Amendment’s

239. *Id.* at 2805 (citation omitted).

240. See Marcia Coyle, *Race Question on Hold; Ruling Doesn’t Spell End of Affirmative Action—Yet*, NAT’L L.J. (Apr. 28, 2014) (Professor Melissa Hart believes “the issue of affirmative action is just on hold” after *Schuette* and will return possibly when the Court’s 2013 decision in *Fisher v. University of Texas* works its way back to the Court). The Fifth Circuit Court of Appeals, on remand from the Court to conduct a closer review of the diversity admissions plan to ensure that it was not discriminatory, affirmed the district court’s grant of summary judgment on behalf of the University of Texas in *Fisher* on July 15, 2014. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).

241. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014).

242. *Id.* at 1638.

243. *Id.* at 1630.

Equal Protection Clause because “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”²⁴⁴ Justice Scalia continued: “It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law . . . [to insure that] they did not simultaneously *offend* it.”²⁴⁵ Justice Scalia also found that the law was “facially neutral” because it directs “state actors to provide equal protection.”²⁴⁶

At the end of his opinion, Justice Scalia quoted from the famous dissenting opinion in *Plessy v. Ferguson*²⁴⁷ as part of his final analysis: “As Justice Harlan observed over a century ago, ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in the way.”²⁴⁸ Justice Scalia also asserted that it was “doubly shameful” for Justice Sotomayor to equate the majority in support of the Michigan prohibition with “‘the majority’ responsible for Jim Crow.”²⁴⁹

Justice Breyer, in a separate concurring opinion, noted that “[w]e need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances” in which the decision making on whether to use raced-based admissions was transferred to the voters away from unelected administrators and “I would hold that it does.”²⁵⁰

In a vigorous dissent, Justice Sotomayor, joined by Justice Ginsburg, asserted that Michigan law violated the Equal Protection Clause because it was oppressive to minority groups.²⁵¹ The dissent maintained that state voters cannot democratically ratify an amendment that violates the Equal Protection Clause, and yet the Michigan amendment both has a racial focus and places a greater burden on racial minorities.²⁵² Specifically, Justice Sotomayor asserted that “[o]ur precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.”²⁵³

244. *Id.* at 1639 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003)) (Scalia, J., concurring in part and dissenting in part).

245. *Id.*

246. *Id.* at 1640.

247. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

248. *Schuetz*, 134 S. Ct. at 1648 (Scalia, J., concurring in part and dissenting in part).

249. *Id.* at 1648 n.11.

250. *Id.* at 1651 (Breyer, J., concurring).

251. *Id.* at 1651 (Sotomayor, J., dissenting).

252. *Id.* at 1653.

253. *Id.*

Further, the dissent viewed section 26 of the Michigan law as having a clear “racial focus” because the text “prohibits Michigan’s public colleges and universities from ‘granting preferential treatment to any individual or group on the basis of race.’”²⁵⁴ The Court therefore should subject the state’s action to strict scrutiny, and the failure of Michigan to assert some compelling interest should have resolved this case.²⁵⁵ Justice Sotomayor also vehemently criticized the Court for failing even to attempt to recognize that “race matters”²⁵⁶ while purposefully appearing to want “to leave race out of the picture entirely.”²⁵⁷

B. United States v. Quality Stores, Inc.

In a tax case affecting the workplace, *Quality Stores*, the Court considered whether, under the Federal Insurance Contributions Act (FICA),²⁵⁸ employee severance payments are taxable wages.²⁵⁹ The Court held that severance payments fall under the broad definition of wages under FICA.²⁶⁰ The Court first examined whether the definition of “wages” in FICA specifically included severance payments.²⁶¹ FICA’s definition is “‘all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.’”²⁶² The Court concluded that “as a matter of plain meaning, severance payments made to terminated employees are ‘remuneration for employment’” and “it would be contrary to common usage to describe as a severance payment remuneration provided to someone who has not worked for the employer.”²⁶³

The Court explained that severance packages are like any other benefit that companies use to attract talented employees.²⁶⁴ Additionally, FICA specifically exempts severance payments made for retirement or disability.²⁶⁵ The Court noted “that exemption would be unnecessary were severance payments in general not within FICA’s definition of ‘wages.’”²⁶⁶

The Court also addressed section 3402(o) of the Internal Revenue Code and its definition of wages.²⁶⁷ Section 3402(o) reads: “(A) any

254. *Id.* at 1659.

255. *Id.* at 1663.

256. *Id.* at 1676.

257. *Id.* at 1675.

258. 26 U.S.C. §§ 3101–3128 (2012).

259. *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1398 (2014).

260. *Id.*

261. *Id.* at 1399.

262. *Id.* (quoting FICA, 26 U.S.C. § 3121(a)).

263. *Id.* at 1399–400.

264. *Id.* at 1400.

265. *Id.*

266. *Id.*

267. *Id.* at 1401.

supplemental unemployment compensation benefit paid to an individual . . . shall be treated as if it were a payment of wages by an employer to an employee for a payroll period.”²⁶⁸ The employer argued that the “as if” language is “an indirect means of stating that the definition of wages for income-tax withholding does not cover severance payments.”²⁶⁹

Rejecting that argument, the Court said that, similar to the FICA definition section, the definitional section for income tax withholding has specific exemptions that do not include severance payments.²⁷⁰ The Court further agreed with the Federal Circuit that “the statement that ‘all men shall be treated as if they were six feet tall does not imply that no men are six feet tall.’”²⁷¹ The Court found “that simplicity of administration and consistency of statutory interpretation” should also “instruct that the meaning of ‘wages’ should be, in general, the same for income-tax withholding and FICA calculations.”²⁷²

VI. Unanimity While Fighting Especially over Words

A strange form of unanimity was a common theme among the labor and employment cases of the 2013–14 term.²⁷³ The Court’s ongoing battle over how to interpret the meaning of words was central to several cases.²⁷⁴ One commentator noted in 2010 that the Justices’ “work more often is deciphering the muddy language of legislative compromise or even the ambiguous words of their predecessors on the bench.”²⁷⁵ In *Sandifer*,²⁷⁶ essentially a unanimous decision of the Justice Scalia highlighted the key to the decision was understanding the meaning of the words “changing clothes” while also recognizing that the terms “donning” and “doffing” were important additional considerations: “We still

268. *Id.* (quoting 26 U.S.C. § 3402(o)).

269. *Id.*

270. *Id.* at 1401–02.

271. *Id.* at 1402 (quoting *CSX Corp. v. United States*, 518 F.3d 1328, 1342 (Fed. Cir. 2008)).

272. *Id.* at 1405.

273. *See supra* notes 20–22 and accompanying text.

274. *See* Sandra J. Mullings, *The Supreme Court Takes on the EEOC: What’s at Stake in Mach Mining?*, 65 *LAB. L.J.* 144, 146 (Sept. 1, 2014) (in employment discrimination cases “the Supreme Court has often harkened to the language, or ‘plain language’ . . . in question” and it is “incorrect to infer that Congress meant anything other than what the text does say”); *see also* Debra Cassens Weiss, *Supreme Court Debates Word Choice in Three Recent Arguments*, *A.B.A. J.* (Oct. 18, 2010), http://www.abajournal.com/news/article/supreme_court_debates_word_choice_in_three_recent_arguments/ (last accessed Dec. 31, 2014) (the Court debated word choice in three cases in 2010, including an employment law case).

275. *See* Robert Barnes, *In Important Cases, Supreme Court Outcomes Determined by a Single Word*, *WASH. POST*, Oct. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/17/AR2010101702799_pf.html (the Court’s struggle to define the meaning of a single word, “filing,” to resolve an employment case under the FLSA).

276. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014).

sing, ‘Don we now our gay apparel’ at Christmas,’ . . . and I suppose a well-bred gentleman still doffs his hat to a lady.”²⁷⁷ One commentator believes that *Sandifer* suggested that “‘preliminary’ and ‘postliminary’ activities are compensable under the FLSA only if they are an ‘integral and indispensable part of the principal activities for which covered workmen are employed.’”²⁷⁸ Future wage and hour cases may support employer arguments that “activities that are tangentially related, but not integral to the performance of one’s job, are not compensable principal activities.”²⁷⁹ Already in 2014, in *Integrity Staffing*, the Court held that “an activity is integral and indispensable to the principal activities that an employee is employed to perform . . . if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”²⁸⁰ The Court concluded that going through Integrity Staffing’s security screening before leaving the workplace did not meet this criterion and was thus noncompensable under the FLSA.²⁸¹

Lawson was another case in which words played a key role: the Court battled over the meaning of the words “an employee” in deciding the scope of whistleblower coverage under SOX.²⁸² Did “an employee” only mean an employee of a publicly traded company or did an employee mean an “officer, employee, contractor, subcontractor, or agent of such company”?²⁸³ In one of its classic debates over words, the Court decided that the statute’s logical reading suggested that “an employee” meant all employees of these entities.²⁸⁴ But the Court used different approaches in determining the meaning.

Justice Scalia considered it not problematic that “an employee” could have such a broad meaning, even if it might lead to absurd results, because clear terms must be adhered to even if those terms allow babysitters or gardeners to be covered by SOX.²⁸⁵ On the other hand, Justice Ginsberg’s majority opinion recognized the expansive nature of a broad interpretation and sought a more pragmatic reading that would not lead to an absurd result.²⁸⁶ While Justice

277. See Adam Liptak, *Justices Allow a Bit of License in Choice of Words During a Possible Air Emergency*, N.Y. TIMES (Jan. 28, 2014), <http://www.nytimes.com/2014/01/28/us/justices-decide-on-air-safety-steelworkers-and-drug-dealers.html> (last accessed Dec. 31, 2014) (comments from Justice Scalia regarding the decision in *Sandifer*).

278. See Lisa Stephanian Burton et al., *More to Supreme Court’s Sandifer Decision Than the Definition of “Clothes,”* NAT’L L. REV., Jan. 30, 2014, <http://www.natlawreview.com/print/article/more-to-supreme-court-s-sandifer-decision-definition-clothes>.

279. *Id.* (emphasis omitted).

280. *Integrity Staffing Solutions, Inc. v. Busk*, 134 S. Ct. 513, 519 (Dec. 9, 2014).

281. *Id.*

282. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

283. *Id.* at 1161–63.

284. *Id.* at 1176.

285. *Id.* (Scalia, J., concurring in part).

286. *Id.* at 1168 (majority op.).

Scalia acknowledged these policy reasons, he criticized the Court for pursuing this analysis instead of relying solely on the text. Justice Scalia framed his textual concern as follows: “I do not endorse, however, the Court’s occasional excursions beyond the interpretive terra firma of text and context, into the swamps of legislative history. Reliance on legislative history rests upon several frail premises.”²⁸⁷ He explained further that “[b]ecause we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law *says*.”²⁸⁸ Justice Scalia added: “on most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved—indeed, were unaware of the issues entirely.”²⁸⁹

Justice Sotomayor’s *Lawson* dissent rejected Justice Scalia’s criticism, using a concern about absurd results to conclude that Congress could not have intended to protect babysitters and gardeners as SOX whistleblowers.²⁹⁰ *Lawson*, probably more than any other case last term, thus highlights the ongoing divisions in the Court about interpretation of words and how those divisions continue to affect labor and employment law.

Both the unusual unanimity and the debate over how to interpret the meaning of words were directly at issue in *Noel Canning*.²⁹¹ Despite the unanimity of the judgment, the justices disagreed about how to interpret the meaning of “recess.”²⁹² Justice Scalia’s textualist views came to center stage as he asserted in a concurring opinion that the language in the Recess Appointments Clause clearly applied only to intersession recesses regardless of whether presidents have made countless appointments without complaint, inconsistent with his analysis.²⁹³ Justice Breyer instead, in *Noel Canning*, examined definitions at the time the constitutional drafters used the language and also considered the pattern of recess appointments over time.²⁹⁴

VII. Conclusion: Labor and Employment Court Concerns for the Immediate Future

Although the debate about the meaning of words will continue to play a key role in deciding cases, some specific areas of labor and

287. *Id.* at 1176 (Scalia, J., concurring in part).

288. *Id.* at 1176–77.

289. *Id.* at 1177.

290. *Id.* at 1183–84 (Sotomayor, J., dissenting).

291. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

292. *Id.* at 2556.

293. *Id.* at 2617 (Scalia, J., concurring).

294. *Id.* at 2559–61 (majority op.).

employment law seem ripe for further Court review. Whistleblowing, wage and hour, labor, and employee benefits law are areas in which the Court will be facing new issues beyond those resolved during the 2013–14 term. Also, while there were no statutory employment discrimination claims during this term, the upcoming docket suggests these claims have returned to the Court's attention.

Despite concern that the Court's unanimity in some cases this past term was specious—in light of some of the concurring opinions—the Court is still resolving more decisions on a purportedly unanimous basis.²⁹⁵ Whether unanimity is a smokescreen will require more analysis of the concurring opinions. When the only exception to unanimity is a single justice objecting to an expansive footnote, as in *Sandifer*, that sounds like wide approval. However, if all the justices agree on the result, but the concurring opinions are so different and critical that there does not appear to be any real agreement about how to deal with the underlying issue, such as the definition of a recess appointment in *Noel Canning*, that decision suggests unanimity was only on the surface.

Labor and employment cases will continue to be an important area of law for the Court to consider. The 2013–14 term demonstrated the breadth of potential labor and employment law matters. The return of employment discrimination issues during the 2014–15 term, along with labor, wage and hour, whistleblowing, and benefits cases, demonstrates the significance of labor and employment matters for the Court, both now and in the future.

295. See Coyle, *supra* note 21.