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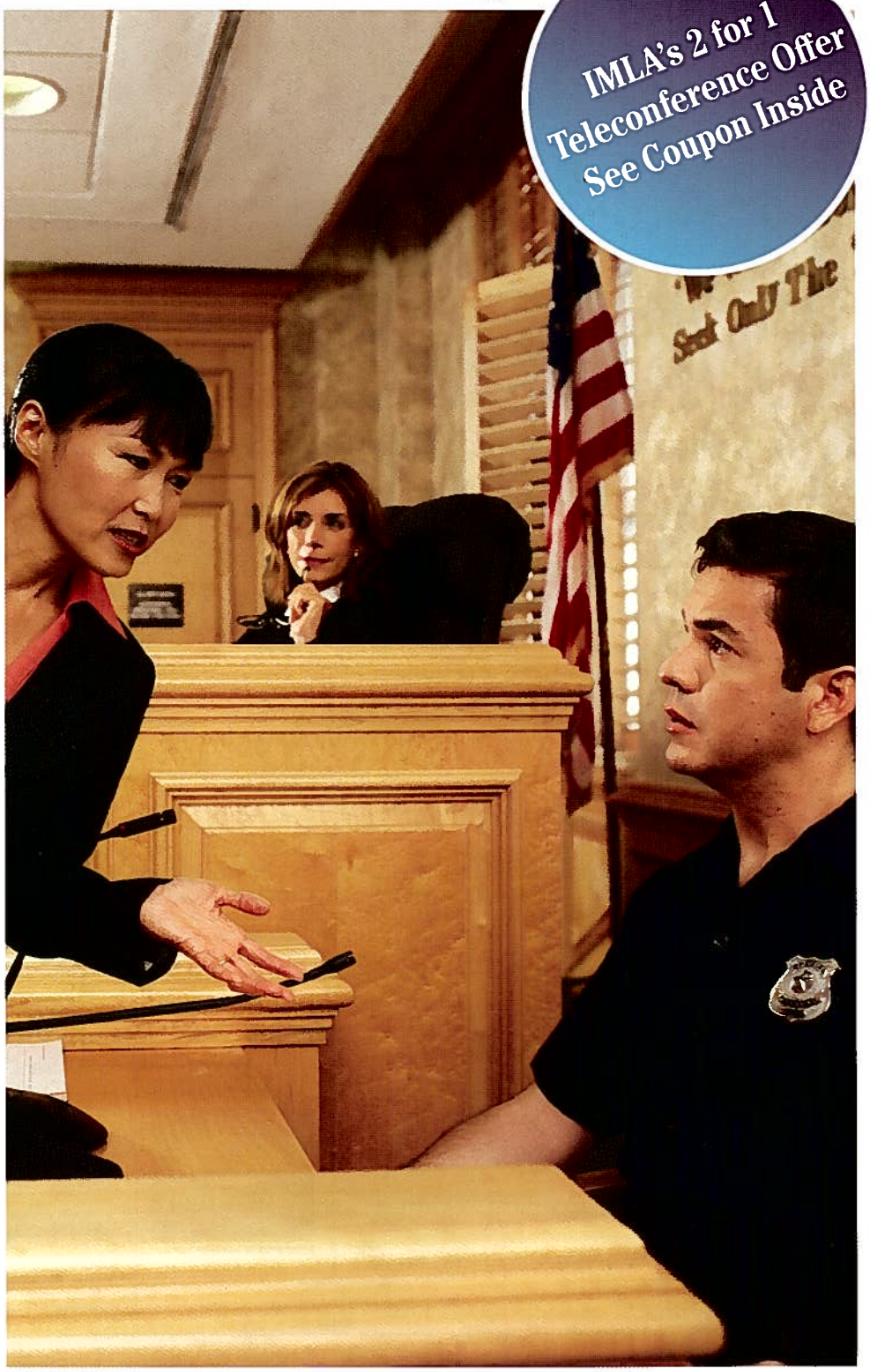
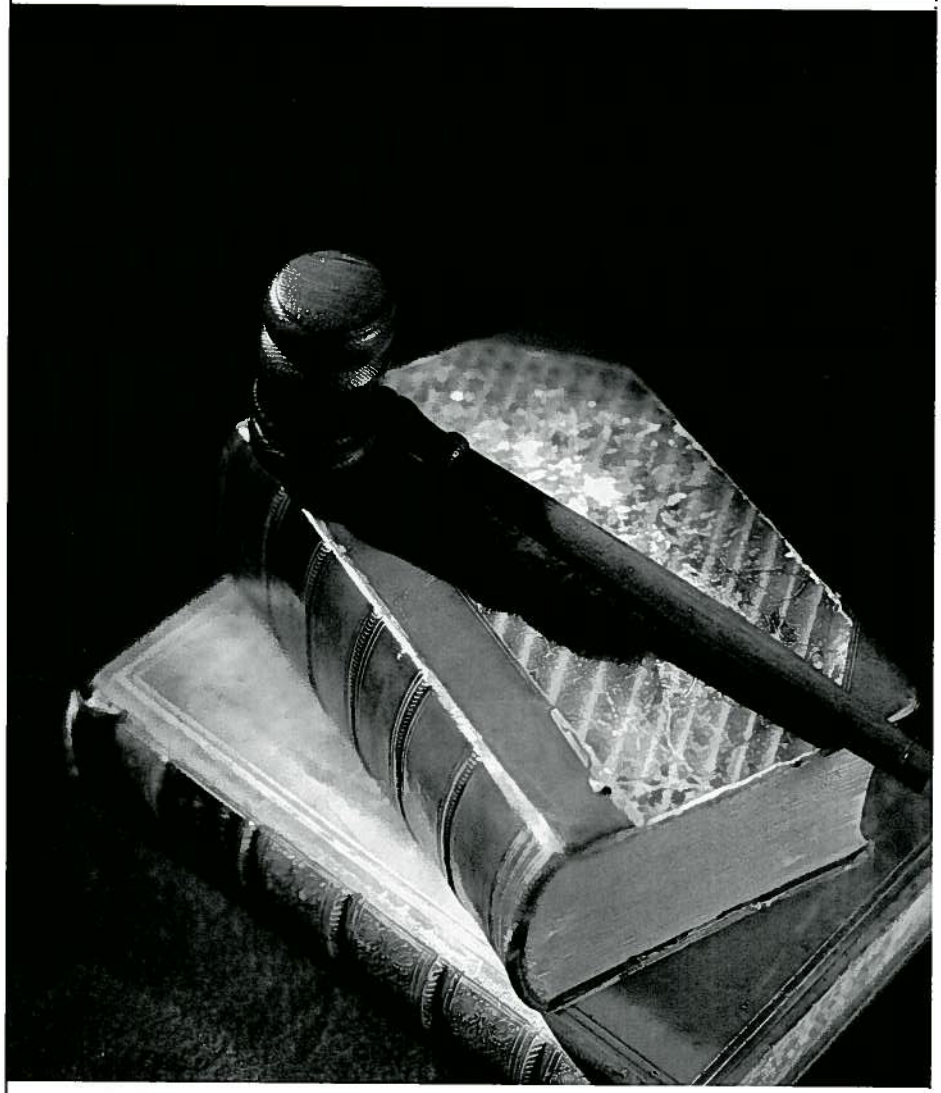


The Supreme Court's 2010 Upcoming Employment Law Docket

by Lawrence L. Lee and Brandon D. Saxon



The United States Supreme Court has a variety of employment cases in its upcoming fall Term that should put all employers on notice. The Court has agreed to review a number of cases that will affect employers' decisions in matters involving background investigations, retaliation, immigration, and liability under Title VII of the Civil Rights Act and the Employee Retirement Income Security Act (ERISA). Ultimately, the Supreme Court's decisions will impact issues of hiring, terminating, and providing accommodation in the workplace.

Background Investigations and Informational Privacy

Last June, the Supreme Court, in *City of Ontario v. Quon*,[1] ruled in a landmark case on the privacy of employee text messages in a government workplace. In a unanimous decision, it held that a government employer's review of a police officer's city-owned pager messages was reasonable and did not violate the Fourth Amendment. The Court's reasoning was based on the fact that the search was motivated by a legitimate work-related purpose and was not excessive in scope.[2] In determining that the search was reasonable, the Court explained that "when conducted for a "noninvestigatory work-related purpos[e]"[3] or for the "investigatio[n] of work-related misconduct,"[4] a government employer's warrantless search was reasonable if it was "'justified at its inception' and if 'the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search."[5] Though the Court deferred answering some of the larger issues presented and limited the breadth of its holding, the case provides some guidance to employers on what factors a court may evaluate in addressing privacy concerns related to employer-issued communication devices.

This fall, the Supreme Court will decide a different issue of privacy in the workplace: the scope of a job applicant's rights during an employer's vetting process. The underlining circumstances in *National Aeronautics and Space Admin. v. Nelson*[6] arose from a new requirement that contract employees of the federal government (including scientists, engineers, and other "low risk" individuals not working with classified information) answer a questionnaire, with questions about their mental health history and any treatment for illegal drug use. Written inquiries were also sent to third parties (references, former employers, and landlords) during a background investigation, seeking "adverse information" about the employee's financial integrity, drug or alcohol abuse, emotional stability, and overall general conduct.[7] The employees sued, claiming the investigations constituted unreasonable searches prohibited by the Fourth Amendment and violated their constitutional right to informational privacy.

While finding no Fourth Amendment violation, the U.S. Court of Appeals for the Ninth Circuit granted an injunction to enjoin the implementation of the new rule based on informational privacy concerns.[8] Although there is no express right to privacy in the U.S. Constitution, a right to privacy, solidified through significant and sweeping decisions,[9] is well established and typically surrounds areas such as marriage, health, and child-rearing. The rule in issue, which required the employees to disclose "any treatment or counseling received" for their drug problems and information relating to medical treatment and psychological counseling, fell

"squarely within the domain protected by the constitutional right to informational privacy."[10] Likewise, the "open-ended" solicitation of "any adverse information" about a person's financial integrity, abuse of alcohol or drugs, mental or emotional stability, general behavior or conduct, and "other matters" was "designed to elicit a wide range of adverse, private information" that was "not generally disclosed by individuals to the public" and, therefore, "seemingly implicate[d] the right to informational privacy."[11]

The issues presented by the case are relatively narrow and both tie the constitutional right to informational privacy to protections under the Privacy Act[12] (specifically, whether the government employer violated constitutional privacy rights when the reference's/employee's response was used only for employment purposes and was protected under the Act). Whichever way the Court decides, the impact on employers could be sweeping. If the Court denies the employees' arguments and finds these kinds of questions do not violate the constitutionally protected right to informational privacy, it could open the door for employers to use broader and potentially more invasive pre-employment questions for applicants and their references. If, however, the Court rules that a job applicant's privacy rights do include protection from such inquiries, employers will need to re-evaluate the scope, nature, and potential effect of their pre-employment screening procedures.

Influencing Employment Decisions

In *Staub v. Proctor Hospital*,[13] the Court will consider whether an employer can be held liable for the unlawful intent of others who cause or influence, but do not personally make, an ultimate employment decision. Staub, the plaintiff, alleged that his termination, though handed down by a senior manager, was actually facilitated by a supervisor who wanted him terminated in retaliation for Staub's involvement with the U.S. Army Reserve. He claimed that the reasons for firing him were just a pretext for discrimination based on his association with the military. He brought suit under the Uniformed Services Employment and Reemployment Rights Act (USERRA),[14] relying on the so-called "cat's paw" theory to prove discrimination (where the discriminatory animus of a non-decision-maker is imputed to an otherwise unbiased decision-maker, where the former has singular influence over the latter and uses that influence to cause the adverse employment action). He alleged that M., a supervisor, fed false information to Buck, the decision-maker; that M. had a hostile animus towards him because he was a member of the reserves; and that Buck relied on this false information (without vetting it in any meaningful way) in deciding to fire him. The trial court ruled in favor of Staub, but the U.S. Court of Appeals for the Seventh Circuit reversed, finding that there was insufficient evidence of non-decision-maker animus, and that the unlawful intent of the supervisor could not be attributed to Buck.[15]

The petitioner's brief succinctly summarizes the potential scope of the case:

> Personnel decisions at most employers are frequently the result of a chain of decisionmaking, in which a series of officials, each playing distinct roles, make separate decisions and take different actions. So long as a biased official in so doing acts as an agent of the employer, the employer is liable for injuries caused by the official's conduct. It makes no difference whether or not the discriminatory official is the last or "ultimate" decisionmaker.[16]

In hearing the appeal, the Supreme Court will address an issue that is relatively broad and can implicate any number of federal anti-retaliation statutes. As such, the Court has the opportunity to either limit its holding to the narrow circumstances under the relevant federal statute here, or take a broader approach and provide a sweeping ruling that may provide clarification on this general issue. Employers should take note of this case as it proceeds, as the Court's decision may trigger a wide array of real-world employment issues regarding influence by other managers or employees on the ultimate employment decision to terminate an employee.

Retaliation Cases

The U.S. Supreme Court currently has two cases involving retaliation claims on the docket for the upcoming Term.

The question the Court will answer in the first, *Kasten v. Saint-Gobain Performance Plastics Corp.*,[17] is whether a verbal complaint constitutes protected conduct under the anti-retaliation provision of the Fair Labor Standards Act (FLSA). Section 15(a)(3) of the Act makes it unlawful for an employer "to discharge or in any manner discriminate against any employee because such employee has filed any complaint...."[18] The case deals with an employee who was disciplined and terminated after failing to adhere to a company policy regarding punching time clocks. Kasten claimed he had previously verbally informed his supervisor and others of his belief that the physical location of the time clocks was illegal because it required employees to put on required safety and protective gear while off the clock. He claimed that he was protected under the FLSA because this amounted to having "filed complaints" with his employers. The Seventh Circuit Court of Appeals affirmed the district court decision granting summary judgment in favor of the employer, finding that unwritten, purely verbal complaints were not protected activity under the FLSA's retaliation provision. The Seventh Circuit

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Upcoming Employment Cases

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relied on the statutory language, focusing on the phrase "filed any complaint." This, it held, meant some form of documentary action; accordingly, a written complaint, submitted to the employer in some way, was necessary in order to trigger the anti-retaliation provision.[19] On en banc review, a majority of the Seventh Circuit voted to deny rehearing.[20]

If the Supreme Court affirms, employers may have additional flexibility in terminating employees who allegedly make verbal complaints, without implicating the anti-retaliation provision of the FLSA. There is a strong likelihood that the Court, however, will reverse in favor of the employee, and remain consistent with legislation that tends to provide employees with the benefit of the doubt in anti-retaliation provisions of various employment statutes.

The second retaliation case should be on all employers' radar. In *Thompson v. North American Stainless, LP*,[21] the Supreme Court will determine whether § 704(a) of Title VII of the Civil Rights Act of 1964[22] creates a cause of action for third-party retaliation for persons who have not personally engaged in a protected activity or personally opposed the employer's allegedly discriminatory conduct. The provision makes it unlawful for an "employer to discriminate against any of his employees .... because he has opposed any practice made an unlawful employment practice" by Title VII, "or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under" Title VII.

Thompson, the plaintiff, and his then fiancée, Regalado, were both employed by North American Stainless, and their relationship was common knowledge at the workplace. Regalado subsequently filed a complaint with the Equal Employment Opportunity Commission (EEOC) against the employer, alleging gender discrimination. Three weeks after the employer was notified of the complaint, Thompson was discharged. He filed suit under Title VII claiming that he was terminated in retaliation for Regalado's EEOC charge. The employer maintained that it had valid, performance-based reasons for the termination. The district court granted summary judgment in favor of the employer, finding that Thompson failed to state a claim under the anti-retaliation and anti-discrimination provisions of Title VII.

In hearing the appeal, the Supreme Court will address an issue that is relatively broad and can implicate any number of federal anti-retaliation statutes.

On appeal, Thompson challenged only the summary adjudication of his anti-retaliation cause of action, which he claimed prohibited his employer from terminating him based on the protected activity of his fiancée. The U.S. Court of Appeals for the Sixth Circuit initially reversed,[23] but, on rehearing en banc, concluded that Title VII did not create a cause of action for "third-party" retaliation. Under the plain language of the statute, Thompson was not included in the class of persons for whom Congress created a retaliation cause of action because he himself did not oppose an unlawful employment practice, or make a charge, testify, assist, or participate in an investigation. The Sixth Circuit declined to construe the anti-retaliation statute to include plaintiffs who were closely related to or associated with a person that had engaged in protected activity, finding that, in most cases, "the relatives and friends who are at risk for retaliation will have participated in *some manner* in a co-worker's charge of discrimination," and would be protected from retaliation based on their own protected activities.[24] The appeals court bolstered its decision by pointing to the fact that no other circuit had found that Title VII created a cause of cause for third-party retaliation on behalf of friends and family members; rather, the Third, Fifth, and Eighth Circuit Courts of Appeal had "soundly rejected such a cause of action."[25]

In the event that the Supreme Court reverses the Sixth Circuit, employers could be prohibited from retaliating against employees who have not complained of any violation of Title VII themselves, but who are related to or associated with an employee who has protested such activity. Of course, the extent to which a non-protesting employee is considered to be "related" or "associated" with a protesting employee would need to be addressed by the Supreme Court if it decides to extend the anti-retaliation provision beyond employees who have personally opposed discrimination.

Undocumented Immigrants

This year, the State of Arizona has featured prominently in the national news over its reforms on illegal immigration enforcement. In *Chamber of Commerce of the United States v. Candelaria*,[26] the Supreme Court will determine whether an Arizona law, the Legal Arizona Workers Act,[27] is preempted by federal laws which expressly preempt any State or local law imposing civil or criminal sanctions upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.

The Legal Arizona Workers Act (LAWA) imposes sanctions on employers who hire illegal aliens, and permits courts in Arizona to revoke the business licenses of employers who knowingly hire unauthorized aliens.[28] In addition, it requires that employers participate in the federal E-Verify program, a program that assists in identifying the legal status of employees.[29]

Before the LAWA took effect, the petitioners—various civil rights and business groups—challenged it on the ground that it was preempted by federal law.[30] Both the district court and the U.S. Court of Appeals for the Ninth Circuit, however, upheld the LAWA against arguments that (1) that the Act was preempted by the Immigration Reform and Control Act (IRCA), which expressly prohibits states from imposing civil or criminal penalties, "other than through licensing or similar laws," on the employers of illegal immigrants, and (2) that the Act was impliedly preempted because, under federal law, participation in the E-Verify program was voluntary.[31] A unanimous panel of the Ninth Circuit rejected both the express

and the implied preemption arguments.

The Supreme Court has granted certiorari and is expected to address both of these preemption arguments. The Court will consider whether the Act is impliedly preempted by a federal "comprehensive scheme" regulating the employment of illegal aliens. State legislatures are following this case closely to determine the potential future implications for regulations on undocumented immigrants in the employment setting. Should the Court uphold the Act, additional jurisdictions may follow suit with similar restrictions, in which case employers may expect heightened regulation concerning the employment of illegal immigrants.

"Likely Harm" Under ERISA

In *CIGNA Corp. v. Amara*,[32] the Court will resolve a circuit split regarding the appropriate standard for determining whether an Employee Retirement Income Security Act (ERISA) plan participant is entitled to recover benefits based on an inaccurate explanation of benefits in a Summary Plan Description, or SPD (a document providing a concise overview of plan benefits). The case currently before the Court is an appeal from the U.S. Court of Appeals for the Second Circuit, challenging the validity of that circuit's "likely harm" standard regarding claims under the ERISA.[33]

In *Amara*, the employer, CIGNA, converted its defined benefit pension plan to a cash contribution plan. During this process, it issued its employees with an SPD describing the differences between the two types of plans.[34] However, the SPD did not inform employees that, under the cash contribution plan, it was possible for a participant's benefits to fall below the minimum provided by the defined benefit plan. A class action lawsuit was filed against CIGNA, alleging that it violated numerous substantive requirements of ERISA and certain of ERISA's disclosure requirements. The district court held that the 26,000 members of the class could recover without showing any individualized harm, as long as the class could show likely harm.[35] This decision was summarily upheld by the Second Circuit in a one-page, unpublished opinion.[36] In seeking review before the Supreme Court, CIGNA argued that the uncertainty created by the circuit split should be ended and that the Second Circuit's "likely harm" standard was incompatible with the "careful balance that ERISA strikes between the protection of plan participants and the promotion of plan formation."[37]

Currently, three different and essentially incompatible standards have been adopted by the various circuits regarding the showing that a plan participant must make in order to be able to recover from a deficient SPD. Six circuits have adopted a "reliance-or-prejudice" standard which requires a plaintiff to show either "some significant reliance upon, or possible prejudice flowing from, the faulty plan description;"[38] three circuits have taken the position that no reliance or prejudice is required in order to recover for a deficient SPD;[39] and the Second Circuit alone has adopted a "likely harm" standard, which permits recovery whenever a participant can show that he or she was likely harmed by a deficient SPD.[40]

After the Supreme Court makes its ruling this fall, the circuit split will likely be resolved, and any standard which the Court adopts will have the positive effect of bringing clarity to this important and relatively complex area of law. That said, employers stand to benefit most if the Court adopts the "reliance-or-prejudice" standard used by the majority of circuits, as it requires individual plaintiffs to show actual damage, and limits the possibility of any "windfall recovery" for large classes of plaintiffs with negligible claims.

Moving Forward

With the recent addition of Justice Elena Kagan to the Supreme Court, the overall balance of the Court's makeup should not produce a significant shift on how the Court reaches its decisions. Nonetheless, even without a shift to the left or right, the upcoming Term promises a number of relatively weighty decisions. Whichever way the Court decides these employment cases, and however broad or narrow the Court's holdings are, there is little doubt that employers and their counsel will be watching.

Notes

1. 130 S. Ct. 2619 (2010).
2. 130 S. Ct. at 2631.
3. *Id.*
4. *Id.* at 2630.
5. *Id.* (citing *O'Conner v. Ortega*, 480 U.S. 709, 725-26 (1987)).
6. NASA v. Nelson, 530 F.3d 865 (9th Cir. 2008), *cert. granted*, 78 U.S.L.W. (Mar. 08, 2010) (No. 09-530).
7. 530 F.3d at 870-71.
8. *Id.* at 877.
9. *See e.g.*, Griswold v. Connecticut, 381 U.S. 478 (1965); Roe v. Wade, 410 U.S. 113 (1973). The specific right to *informational* privacy was first recognized by the Supreme Court in 1977 in *Whalen v. Roe*, 429 U.S. 589 (1977).
10. 530 F.3d at 879.
11. *Id.*
12. 5 U.S.C. § 552a (West 2010).
13. 560 F. 3d 647 (7th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3208, (U.S. Apr. 19, 2010) (No. 09-400).
14. 38 U.S.C. § 4301 *et seq.* (West 2010).
15. 560 F.3d at 657. It held Staub's "abundant evidence" of M.'s animosity was erroneously admitted into evidence, and this error was prejudicial because the strongest proof of anti-military sentiment came from the improperly admitted evidence. Further, Staub had never claimed that Buck had an anti-military animus.
16. Brief for Petitioner, Vincent Staub, 2010 WL 2690585 at *16.
17. Kasten v. Saint Gobain Performance Plastics Corp., 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3439 (U.S. Mar. 22, 2010) (No. 09-834).
18. 29 U.S.C. § 215(a)(3) (West 2010).
19. 570 F.3d 834, 840 (7th Cir. 2009).
20. 585 F.3d 310 (7th Cir. 2009).
21. 567 F.3d 804 (6th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3007 (U.S. June 29, 2010) (No. 09-291).
22. 42 U.S.C. § 2000e-3(a) (West 2010).
23. 520 F.3d 644 (6th Cir. 2009).
24. 567 F.3d at 810 (citing *Holt v. JTM Industries*, 89 F.3d 1224, 1227 (5th Cir. 1996)) (emphasis in original).
25. *Id.* at 812.
26. Appeal from *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom., Chamber of Commerce of the United States*

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v. Candelaria, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115).
27. ARIZ. REV. STAT. §§ 23-211 to 23-216 (2007).
28. *Id.* at § 23-212.
29. *Id.* at § 23-214.
30. The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1324a-1324b (West 2010), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C.
31. *Chicanos Por La Causa*, 558 F.3d at 866.
32. 348 Fed. Appx. 627 (2d Cir. 2009), *cert. granted*, 78 U.S.L.W. 3419 (U.S. June 28, 2010) (No. 09-804).
33. *Id.*
34. Amara v. CIGNA Corp., 534 F. Supp. 2d 288, 300 (D. Conn. 2006).
35. *Id.* at 352.
36. *CIGNA*, 348 Fed. Appx. at 627.
37. Brief of Petitioner-Appellant at 2, *CIGNA Corp. v. Amara*, (U.S. June 28, 2010) (No. 09-804).
38. Govoni v. Bricklayers, Masons, & Plasterers Int'l Union of Am., Local No. 5 Pension Fund, 732 F.2d 250, 252 (1st Cir. 1984).
39. Washington v. Murphy Oil USA, Inc., 497 F.3d 453, 458 n.1 (5th Cir. 2007).
40. Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 112 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004). M

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signed, the City withdrew funding for the project. The LCD told the Metros that their option could no longer be exercised, but the evidence indicated that the LCD did not communicate this information to Metro Family until at least August of 2005. Well into 2002, LCD officials continued to express their hope to the Metros that the project would be resumed. Ultimately, the Metro property was used, instead, for a highway bridge, and the parcel described by the option was "virtually unusable" because it was situated below a new extension of a highway.

The Metros sued, alleging a breach of contract. The district court found for the plaintiffs. When the City decided to withdraw funding, the court concluded that the essential purpose of the agreement failed, and that this created a latent ambiguity in the document which could be interpreted using extrinsic evidence (principally from the negotiating history of the option agreement). It found the parties had made a mutual mistake of fact, and on that ground and under the theory of promissory estoppel, the court concluded that the Metros should be entitled to exercise the option. Even though there was no evidence of the monetary value of the option, the court thought that reformation of the contract was appropriate, and ordered reformation to extend the date by which the option could be exercised to within 18 months of the date of its order. However, it rejected the Metros' request for money damages on the ground that their proof of injury about the fair market value of the Metro Family property, or the amount of any income stream lost from an inability to exercise the option, was too speculative. The City and the LCD appealed, arguing that reformation was inappropriate because there was no mutual mistake of fact (i.e., at the time the agreement was made, funding was secure and both parties thought it would proceed). Metro Family cross-appealed.

On appeal, the U.S. Court of Appeals for the Seventh Circuit vacated the district court judgment and remanded the case back. While there was no fault in the lower court's finding that a breach of the agreement occurred and that Metro Family was entitled to a remedy, the remedy ordered was inappropriate. The real problem, "no matter what label we use, stems from the fact that the parties to this contract failed to allocate the risk that the levee project would be canceled. In such a situation, on whom should the loss fall?" In the absence of any evidence suggesting that Metro Family intended to forgive part of the purchase price if the project was abandoned, the court assumed that the risk of that event's occurrence was that of the LCD. The equitable remedy of reformation was available where there had been a mutual mistake such that the written instrument did not reflect the parties' intentions, or when there had been a mistake on the part of one party accompanied by fraud or inequitable conduct. The court ruled out the second possibility, but found that the mutual mistake was that the project had reached the point beyond which cancellation was out of the question. Reformation of the contract would have been reasonable if the 1.4 acres were still available to purchase, but the parcel was now "utterly inaccessible." The closest to making Metro Family "whole" for the shortfall in compensation was to determine how much it lost at the moment that the option became impossible to exercise. In the absence of evidence on this issue, the matter was remanded to the district court for further proceedings. *Louis & Karen Metro Family, LLC v. Lawrence Conservancy Dist.*, Nos. 09-2418, 09-2482, 2010 WL 2944219 (7th Cir. July 29, 2010). M