1997

Section 9: Also This Term

Institute of Bill of Rights Law at the William & Mary Law School

96-1291 OUBRE V. ENTERGY OPERATIONS INC.

Ruling below (CA 5, 11/6/96, unpublished):

District court's summary judgment for employer in employee's age discrimination action against it is affirmed for reasons stated by district court, namely, that employee waived her right to bring action because she accepted voluntary severance package and signed associated release of claims, and, even though release was flawed, by choosing not to offer to return benefits paid in consideration for waiver, employee ratified it and manifested intent to be bound by it.

Question presented: Did petitioner ratify otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to terms of her separation of employment, thus making release binding?

96-1581 SOUTH DAKOTA V. YANKTON SIOUX TRIBE

Ruling below (Yankton Sioux Tribe v. Southern Missouri Waste Management District, CA 8, 99 F.3d 1439):

Court affirms district court's ruling that landfill site over which state claims jurisdiction is, though owned by non-Indian, still part of Yankton Sioux reservation, so that federal environmental laws apply, but that tribe, which did not establish exception to general rule that Indian tribes cannot regulate activities of non-Indians, even on reservation, does not have regulatory authority over landfill project or authority to approve it; state's claim to jurisdiction over site on basis that reservation, which had been established by 1858 treaty, had been disestablished or diminished by 1894 statute that incorporated 1892 agreement between tribe and United States under which federal government bought 200,000 acres of unallotted land within reservation for sale to non-Indian settlers, is rejected; neither 1894 statute nor its legislative history indicates that Congress intended that boundaries established by 1858 treaty be disestablished or diminished, and facts that area did not lose its "Indian character" and that Indian population and influence in area are increasing defeat argument that "de facto" diminishment took place, even in absence of congressional intent.

Question presented: Has Yankton Sioux reservation been disestablished or diminished by virtue of 1894 act adopting "cession and sum certain" agreement between Yankton Sioux Tribe and United States and by virtue of its century long treatment as disestablished or diminished?

96-1577 ALASKA V. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT

Ruling below (CA 9, 101 F.3d 1286):

Test for determining whether Native American tribe constitutes "dependent Indian community" within meaning of 18 USC 1151 (b), defining "Indian country," requires showing of federal set aside and federal superintendence, such requirements to be construed broadly and informed by consideration of (1) nature of area; (2) relationship of area inhabitants to Indian tribes and federal government; (3) established practice of government agencies toward that area; (4) degree of federal ownership of and control over area; (5) degree of cohesiveness of area inhabitants; and (6) extent to which area was set aside for use, occupancy, and protection of dependent Indians; under that test, Alaska Native

Claims Settlement Act neither eliminated federal set aside for Alaska Natives, as such, nor terminated federal superintendence over Alaska Natives, notwithstanding its transfer of title to settlement lands to Native corporations that were empowered to opt out of supervisory controls, and thus Indian country may still exist in Alaska; although Native Village of Venetie Tribal Government is no longer reservation owned or controlled by federal government, it meets all other factors above, in that Venetie has special use and occupancy relationship to its land, its inhabitants maintain significant contacts and relationships with numerous federal agencies, federal government continues to be involved in affairs of Natives, high degree of cohesiveness among its inhabitants indicates that Venetie is strong and distinct Native community, and reunification of Venetie with its former reservation land via statutory mechanism provided by Congress demonstrates that land has been set aside for Indians, as such; accordingly, Venetie is dependent Indian community whose territory qualifies as Indian country.

Questions presented: (1) Did Ninth Circuit correctly hold--in conflict with clear intent of Congress in enacting ANCSA, decisions of Alaska Supreme Court, and interpretation of federal agency charged with implementing ANCSA--that ANCSA land may constitute Indian country within Section 1151(b)? (2) If so, did Ninth Circuit correctly hold--in conflict with decisions of this court and other federal circuits--that determination whether land is Indian country within Section 1151 (b) should depend upon ad hoc, six-part balancing test incapable of producing predictable results?

96-1037 KIOWA TRIBE OF OKLAHOMA V. MANUFACTURING TECHNOLOGIES INC. NATIVE AMERICANS

Ruling below (Okla CtApp DivI, 6/28/96, unpublished):

State court has jurisdiction over lawsuit, filed against federally recognized Indian tribe to collect on delinquent promissory note, that has not been expressly prohibited by Congress and that does not infringe on tribal self-government.

Questions presented: (1) Under Indian Commerce Clause, is federally recognized Indian tribe that has not waived its sovereign immunity subject to 'inherent jurisdiction' of state court because commerce from which suit arises took place, in part, outside tribal territory? (2) Under Indian Commerce Clause and Treaty Clause, can state jurisdiction over Indian tribes be limited solely by explicit 'ouster' of that jurisdiction by Congress?

96-653 BAKER V. GENERAL MOTORS CORP.

Ruling below (CA 8, 86 F.3d 811, 65 LW 2060):

Michigan state court injunction, to which automaker's former employee consented in settlement of his wrongful discharge claim, that barred former employee from testifying against automaker in any product liability case is entitled to full faith and credit, and thus bars former employee from appearing as witness in product liability case against automaker in federal district court in Missouri even though settlement agreement between automaker and former employee provides that if former employee were ordered to testify by court or other tribunal, he could do so without violating settlement agreement.

Question presented: Did court below err in holding that petitioners, who were not parties to state proceeding or in privity with any party, could be precluded from obtaining witness's testimony on basis of obligation to give full faith and credit to state court judgments?

96-1482 LEXECON INC. V. MILBERG WEISS BERSHAD HYNES & LERACH

Ruling below (CA 9, 102 F.3d 1524, 65 LW 2423):

Federal district court to which multidistrict litigation has been transferred "for coordinated or consolidated pretrial proceedings" under 28 USC 1407 (a) may transfer such litigation to itself for trial pursuant to 28 USC 1404 (a), notwithstanding Section 1407 (a)'s mandate that transferred case be remanded "at or before the conclusion of such pretrial proceedings unless it shall have been previously terminated."

Question presented: May district court, to which case has been transferred solely for "consolidated pretrial proceedings" under federal multidistrict litigation statute, 28 USC 1407 (a), transfer case to itself for purposes of trial, notwithstanding Section 1407 (a)'s explicit command that every such case "shall be remanded" at conclusion of pretrial proceedings "to district from which it was transferred"?

96-1375 ST. PAUL-RAMSEY MEDICAL CENTER INC. V. SHALALA

Ruling below (CA 8, 91 F.3d 57):

Regulations promulgated in 1989 that implement statutory directive to establish 1984 as base year for new methodology to reimburse, under Medicare program, teaching hospital's graduate medical education costs, and that authorize re-audit of hospital's 1984 base year GME costs in order to exclude "nonallowable or misclassified costs," do not constitute retroactive rulemaking, even though three-year reopening period for finally determining 1984 GME costs under prior regime had expired.

Question presented: Does provision in 1986 legislation establishing new Medicare payment methodology for GME costs that directs secretary of health and human services to "determine," for hospital's 1984 cost reporting year, "average amount [of hospital's GME costs] recognized as reasonable under this subchapter . for each full-time-equivalent resident" require secretary to "determine . . . average" using actual, final "amount recognized as reasonable under this subchapter" for 1984, or does it authorize secretary, in determining average, to re-audit and redetermine amount of 1984 GME costs after reopening and record-retention periods for 1984 have expired?

96-370 BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND V. FERBAR CORPORATION OF CALIFORNIA INC.

Ruling below (CA 9, 73 F.3d 971, 19 EBC 2519):

Six-year limitations period of Multiemployer Pension Plan Amendments Act, 29 USC 1451(f) (2), bars multiemployer pension plan fund's action against employer to collect withdrawal liability that was filed more than six years after employer effected complete withdrawal from plan.

Question presented: Does cause of action for recovery of withdrawal liability under MPPAA arise: (a) on date employer withdraws from plan; (b) on date first payment becomes overdue; (c) for each payment due, on date that payment becomes overdue, unless plan sponsor elects to invoke statutory provision permitting acceleration of entire withdrawal liability debt after default; or (d) on some other date?

96-795 ALLENTOWN MACK SALES AND SERVICE INC. V. NATIONAL LABOR RELATIONS BOARD

Ruling below (CA DC, 83 F.3d 1483, 64 LW 2780, 152 LRRM 2257):

National Labor Relations Board's rule that employer may poll its employees for evidence of lack of union support only if it has objective indications raising reasonable doubt about union's majority status is entitled to deference; substantial evidence supports board's finding that only seven of 32 employees in bargaining unit made statements repudiating union and that successor employer therefore did not have reasonable doubt about union's continuing majority status.

Question presented: Did NLRB err in holding that successor employer cannot conduct poll to determine whether majority of its employees support union unless it already has obtained so much evidence of no majority support as to render poll meaningless?

96-188 GENERAL ELECTRIC CO. V. JOINER

Ruling below (CA 11, 78 F.3d 524):

District court ruling on admissibility of evidence is reviewed for abuse of discretion, but because Federal Rules of Evidence governing expert testimony display preference for admissibility, particularly stringent standard of review is applied to district judge's exclusion of expert testimony; to extent that district court's ruling turns on interpretation of Federal Rules of Evidence, appellate review is plenary.

Question presented: What is standard of appellate review for trial court decisions excluding expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 61 LW 4805 (1993)?

96-910 CHICAGO V. INTERNATIONAL COLLEGE OF SURGEONS

Ruling below (CA 7, 91 F.3d 981):

Landowner's complaints challenging city's denials of demolition permits and application for economic hardship exception for buildings covered by landmarks ordinance do not, under Illinois statute, require de novo judicial review, but rather deferential review of fact-finding as "prima facie true and correct," and thus complaints are appellate proceedings that are not removable as "civil action . of which the district courts . . . have original jurisdiction" within meaning of 28 USC 1441 (a); nor are such state law appellate claims, even when accompanied by federal constitutional claims, removable under 28 USC 1441 (c), which contemplates removal of "entire case" and district court's determination of "all issues therein"; accordingly, judgment for city on state law claims is reversed

and remanded with instructions to remand those claims to state court; district court's dismissal as moot of related federal declaratory judgment action is remanded for determination of appropriate treatment pending resolution of landowner's state law claims.

Question presented: Is lawsuit containing claims that local administrative agency's decision violates federal law, but also containing state law claims that are not reviewed de novo, "civil action" within original jurisdiction of federal district courts?

96-1395 KING V. ERICKSON

Ruling below (CA FC, 89 F.3d 1575):

Federal agency may not, consistently with Fifth Amendment's Due Process Clause, charge employee both with employment-related misconduct and with making false statement regarding that alleged misconduct based on employee's denial of charge or facts underlying charge.

Question presented: Does Due Process Clause preclude federal agency from sanctioning employee for making false statements to agency regarding allegations that employee had engaged in employment-related misconduct?