2005

Section 10: Miscellaneous

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

X. MISCELLANEOUS

In This Section

Also this Term: Other Cases from the 2005-06 Term

Arbaugh v. Y&H Corp.

(04-944)

Ruling Below: *Arbaugh v. Y&H Corp.*, 380 F.3d 219 (5th Cir. 2004), *cert. granted* 125 S. Ct. 2246 (U.S. May 16, 2005).

Jenifer Arbaugh, a bartender and waitress at a Y&H Corporation restaurant, filed suit against her employer alleging sexual harassment in violation of Title VII. After a jury trial returned verdict in Arbaugh's favor, Y&H filed a motion to dismiss the case for lack of subject matter jurisdiction. Y&H argued that during the relevant years Arbaugh was employed, the restaurant did not employ 15 or more employees for 20 calendar weeks, thus exempting it from Title VII coverage. The district court granted Y&H's motion and vacated the jury verdict and judgment. The Fifth Circuit Court of Appeals affirmed, holding that the employee census finding is determinative of subject matter jurisdiction and that the district court correctly concluded that the restaurant employed fewer than 15 employees.

Question Presented: Section 701(b) of Title VII of the Civil Rights Act applies the Title VII prohibition against employment discrimination to employers with 15 or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?

Brown v. Sanders

(04-980)

Ruling Below: *Sanders v. Woodford,* 373 F.3d 1054 (9th Cir. 2004), *cert. granted* 125 S. Ct. 1700 (U.S. March 28, 2005).

Ronald Sanders was found guilty of murder. Upon review, the California Supreme Court invalidated two of the "special circumstances" that the jury had found and had weighed in deciding whether to impose the death penalty. Despite this invalidation, the California Supreme Court affirmed the imposition of the death penalty. The district court denied Sanders' habeas petition as it related to the imposition of the death penalty. The Ninth Circuit Court of Appeals reversed, holding that the California Supreme Court had not conducted an independent reweighing or a proper harmless error analysis. This failure had a substantial and injurious effect on the sentencing. The Ninth Circuit remanded with instructions to grant the habeas petition unless the state within a reasonable time either granted a new penalty trial or vacated the death sentence and imposed a lesser sentence consistent with law.

Question Presented: 1) Is the California death penalty statute a "weighing statute" for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty? 2) If an affirmative answer to the first question was dictated by precedent, was it necessary for the state supreme court to specifically use the phrases "harmless error" or "reasonable doubt" in

determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

Buckeye Check Cashing, Inc. v. Cardegna

(04-1264)

Ruling Below: *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860 (Fla. 2005), *cert. granted* 125 S. Ct. 2937 (U.S. June 20, 2005).

John Cardegna and other class action plaintiffs filed a suit against Buckeye claiming that Buckeye made illegal usurious loans disguised as check cashing transactions. Buckeye filed a motion to compel arbitration pursuant to provisions providing for arbitration contained in the deferred deposit and disclosure agreement signed by the plaintiffs. The state trial court denied the motion, but the state Fourth District Court of Appeals reversed that decision, holding that the Federal Arbitration Act applies and that Cardegna's challenge to the underlying contract's validity must be resolved by an arbitrator, not a trial court. The Fourth District's opinion directly conflicted with a Fifth District opinion, which held that arbitration could not be compelled under a contract that would be void under Florida law, and that the issue of the contract's legality had to be determined in Florida's courts. The Supreme Court of Florida agreed with the Fifth District's opinion and quashed the Fourth District opinion, holding that the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida's usury laws. If the underlying contract was void as a matter of law, the arbitration clause would be nullified. The Supreme Court of Florida remanded the case to a trial court to determine the contract's legality before requiring the plaintiffs to submit to arbitration.

Question Presented: Did the Florida Supreme Court err by holding, consistent with the Alabama Supreme Court but in direct conflict with 6 federal courts of appeals, that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality?

Dolan v. United States Postal Service

(04-848)

Ruling Below: *Dolan v. United States Postal Service*, 377 F.3d 285 (3rd Cir. 2004), *cert. granted* 125 S. Ct. 1928 (U.S. Apr. 25, 2005).

Barbara Dolan was allegedly injured as a result of mail negligently placed on her porch by a United States Postal Service (USPS) employee. Dolan filed a claim against the USPS under the Federal Tort Claims Act (FTCA). The district court granted USPS's motion to dismiss for lack of subject matter jurisdiction, citing the 28 U.S.C. § 2680(b) exception to the FTCA for negligent transmission of the mail. The Third Circuit Court of Appeals affirmed, rejecting Dolan's argument that the exception applied only to mail lost, delayed, or damaged in transit. The Third Circuit stated that any ambiguities in the language of a purported waiver of sovereign immunity had to be construed in favor of the government. The FTCA's expansive language, including the

phrase "any claim arising out of," evinced Congress' intent to broaden rather than limit the exception for negligent transmission of letters or postal matter. The Third Circuit held that, in the context of delivering postal matter, "transmission" means the process of conveying from one person to another, starting when the USPS receives the postal matter and ending when the USPS delivers the postal matter.

Question Presented: Does this case call for an exercise of the Supreme Court's supervisory power where there is a dispute between the circuits of the courts of appeals as to whether the exception to the FTCA, 28 U.S.C. § 2680(b), barred this lawsuit and where the Third Circuit narrowly construed the Act?

Domino's Pizza, Inc. v. McDonald

(04-593)

Ruling Below: *McDonald v. Domino's Pizza,* Inc., 107 Fed. Appx. 18 (9th Cir. 2004), *cert. granted* 125 S. Ct. 1928 (U.S. Apr. 25, 2005).

John McDonald, a shareholder in Domino's Pizza, Inc., sued Domino's, alleging § 1981 civil rights violations. The district court dismissed the suit. The Ninth Circuit Court of Appeals reversed, holding that a party may sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by a corporation. The Ninth Circuit acknowledged that the same discriminatory conduct can result in both corporate and individual injuries.

Question Presented: In the absence of a contractual relationship with the defendant, are allegations of personal injury alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

Hartman v. Moore

(04-1495)

Ruling Below: *Moore v. Hartman,* 388 F.3d 871 (D.C. Cir. 2004), *cert. granted* 125 S. Ct. 2977 (U.S. June 27, 2005).

William Moore, CEO of a company seeking to sell its product to the United States Postal Service, sued the USPS and several postal inspectors, claiming that the postal inspectors had pursued criminal charges against Moore in retaliation for exercising his First Amendment rights. Moore was ultimately acquitted of all criminal charges and brought this civil action under *Bivens*. The postal inspectors claimed qualified immunity because probable cause supported their decision to seek prosecution. The Court of Appeals for the District of Columbia Circuit affirmed the district court's denial of the postal inspectors' claim, holding that the law barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so.

Question Presented: Whether law enforcement agents may be liable under *Bivens* for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

Lamarque v. Chavis

(04-721)

Ruling Below: *Chavis v. Lemarque,* 382 F.3d 921 (9th Cir. 2004), *cert. granted* 125 S. Ct. 1969 (U.S. May 2, 2005).

Reginald Chavis was convicted of attempted first degree murder in state court. His state court appeals and habeas petitions were unsuccessful. The district court dismissed his federal habeas petition as untimely under the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA took effect while Chavis' state supreme court habeas petition was pending. The AEDPA's one year statute of limitations may be tolled while a petitioner has pending and properly filed state habeas petitions. The district court held that Chavis' first state petitions did not toll the statute of limitations because the AEDPA was not enacted until after these petitions were denied. Likewise, the later petitions did not toll the statute of limitations because they were filed more than one year after AEDPA's effective date. Chavis' federal petition, therefore, was barred. The Ninth Circuit Court of Appeals reversed, holding that a state habeas petition filed before the AEDPA limitations period began to run tolled the limitation period. The Ninth Circuit stated that a habeas petition is considered pending during one full round of state review, which in California includes petitions in Superior Court, the Court of Appeal, and the Supreme Court. Therefore, Chavis was entitled to tolling during his 2 rounds of state habeas petitions, but not for the time that ran between the close of the first round of petitions and the beginning of the second round of petitions.

Question Presented: Did the Ninth Circuit contravene the Supreme Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition—and was therefore entitled to tolling during that entire period—because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

Lincoln Property Co. v. Roche

(04-712)

Ruling Below: *Roche v. Lincoln Property Co.,* 373 F.3d 610 (4th Cir. 2004), *cert. granted* 125 S. Ct. 1398 (U.S. Feb. 28, 2005).

Christopher and Juanita Roche, tenants in Lincoln's apartments in Virginia, sued Lincoln claiming various state tort claims arising from the discovery of mold in the Roches' apartment. Lincoln removed the case to federal court claiming diversity of citizenship because Lincoln Property Company is a Texas corporation. The district court granted Lincoln's motion for

summary judgment. The Fourth Circuit Court of Appeals reversed as to subject matter jurisdiction and required remand to the state court, finding that Lincoln had not met its burden of proving diversity of citizenship. The Fourth Circuit found that Lincoln's structure was complex and comprised of partnerships, one of which was authorized and registered in Virginia. This subsidiary's officer, a Virginia resident, was designated as a "partner" of a Lincoln entity. The Fourth Circuit concluded that the subsidiary in Virginia was the real and substantial party in interest rather than Lincoln, and, therefore, there was a stronger nexus to Virginia than to Texas.

Question Presented: 1) Whether an entity not named or joined in a lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b). 2) Whether a limited partnership's citizenship for diversity subject matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

Martin v. Franklin Capital Corp.

(04-1140)

Ruling Below: *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (9th Cir. 2004), *cert. granted* 125 S. Ct. 1941 (Apr. 25, 2005).

Gerald and Juana Martin, class action plaintiffs, sued Franklin, a lender and insurer, alleging illegalities with respect to automobile financing and insurance contracts. Franklin removed to federal court claiming that the amount in controversy could be aggregated for the entire class to total an amount in controversy exceeding the statutory amount required for diversity jurisdiction. The Tenth Circuit Court of Appeals reversed the district court and required remand to state court, holding that an aggregation of punitive damages or attorney's fees could not satisfy the amount in controversy requirement. Following remand to state court, the Martins filed a motion in the district court seeking attorney's fees and expenses. The district court denied the motion and the Tenth Circuit affirmed this denial. The Tenth Circuit held that when the Franklin defendants removed the action to federal court, they possessed legitimate grounds upon which to believe punitive damage claims could be aggregated in a class action suit in order to satisfy the amount in controversy requirement. The Tenth Circuit concluded, therefore, that the defendants possessed objectively reasonable grounds to believe the removal was legally proper.

Question Presented: What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a removed case to state court?

Richards v. Prairie Band Potawatomi Nation

(04-631)

Ruling Below: *Prairie Band Potawatomi Nation v. Richards,* 379 F.3d 979 (10th Cir. 2004), *cert. granted* 125 S. Ct. 1397 (U.S. Feb. 28, 2005).

The Nation challenged a Kansas state law that collected a tax on fuel supplied to the tribe by a non-Indian distributor. The state law was designed so that the tax is placed on the non-Indian distributors, not the Indian retailer. The district court granted summary judgment in favor of the Secretary of the Kansas Department of Revenue. The Tenth Circuit Court of Appeals reversed, holding that the state tax was preempted by strong tribal and federal interests against the tax. The Nation's interests were aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments. Kansas' interest in raising revenues did not outweigh the Nation's strong interests. The Tenth Circuit, therefore, invalidated the state fuel tax as it applied to the Nation's fuel.

Question Presented: 1) When a state taxes the receipt of fuel by non-tribal distributors, manufacturers, and importers, and such receipt occurs off-reservation, does the interest-balancing test in *White Mountain Apache Tribe v. Bracker* apply because the fuel is later sold by a tribe to final consumers? 2) Should the Court abandon the *White Mountain Apache Tribe* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependent on Congressional intent? 3) Did the Court of Appeals err in applying the *White Mountain Apache Tribe* interest-balancing test by, *inter alia*, placing dispositive weight on the fact that a tribally owned gas station derives income from largely non-tribal patrons of the tribe's nearby casino?

United States v. Olson

(04-759)

Ruling Below: *Olson v. United States,* 362 F.3d 1236 (9th Cir. 2004), *cert. granted* 125 S. Ct. 1591 (U.S. Mar. 7, 2005).

Joseph Olson and Javier Vargas, miners, and Monica Olson, Joseph's spouse, sued the Mine Safety and Health Administration (MSHA) under the Federal Tort Claims Act (FTCA) claiming that MSHA was liable for the miners' injuries due to its negligence in carrying out or failing to carry out mandatory MSHA policies and procedures. The district court entered judgment in favor of the United States, holding that the discretionary-function exception to the FTCA immunized the United States from liability. The Ninth Circuit Court of Appeals reversed, finding that the MSHA had failed to meet its burden in showing that the exception applied. MSHA policies prescribed a course of action that a supervisor failed to follow in ensuring that all complaints were handled in accordance with MSHA policy and procedures. Because of the supervisor's failure, the MSHA had not established that the discretionary-function exception covered the supervisor's actions. The Ninth Circuit concluded that the Olson plaintiffs stated a claim since they alleged facts showing the breach of mandatory duties.

Question Presented: Whether the liability of the United States under the FTCA with respect to safety inspections is the same as that of private individuals under like circumstances or, as the Ninth Circuit held, the same as that of state and municipal entities under like circumstances.

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.

(04-597)

Ruling Below: *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341 (Fed. Cir. 2004), *cert. granted* 125 S. Ct. 1396 (U.S. Feb. 28, 2005).

Unitherm, manufacturer of food processing equipment, and Jennie-O Foods, competitor of defendant Swift-Eckrich's Conagra, filed suit against Swift-Eckrich, a patent holder, seeking to have a Swift-Eckrich patent deemed invalid and unenforceable. Swift-Eckrich held a patent that Jennie-O had determined was identical to a process developed and marketed by Unitherm several years before Swift-Eckrich asserted its rights under the patent. The Federal Circuit Court of Appeals affirmed the district court judgment, holding that the district court had properly construed the disputed terms in the patent and had properly found Swift-Eckrich's patent to be invalid and unenforceable. The Federal Circuit also affirmed a jury verdict against Swift-Eckrich for attempted monopolization and tortious interference with prospective economic advantage. The Federal Circuit, however, vacated the jury verdict as to Unitherm's antitrust claims because of a total absence of economic evidence capable of sustaining those claims.

Question Presented: Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.

Whitman v. Department of Transportation

(04-1131)

Ruling Below: *Whitman v. Dep't of Transportation,* 382 F.3d 938 (9th Cir. 2004), *cert. granted* 125 S. Ct. 2962 (U.S. June 27, 2005).

Terry Whitman, an employee of defendant Federal Aviation Administration (FAA), sued defendant alleging the FAA violated his rights by disproportionately testing him for substance abuse. Whitman initially filed his charge with the Federal Labor Relations Agency, which responded that it lacked jurisdiction and that Whitman's only recourse was through the negotiated grievance procedure established by the collective bargaining agreement. Whitman never initiated the grievance procedures, but instead filed suit in district court. The district court dismissed the claim for lack of subject matter jurisdiction. The Ninth Circuit Court of Appeals affirmed, holding that the Civil Service Reform Act does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements. The Ninth Circuit stated that even if it viewed the complaint of disproportionate testing as a "prohibited personnel practice" instead of as an "employee grievance," Whitman was still required to pursue corrective action under the collective bargaining agreement.

Question Presented: 1) Whether the 5 U.S.C. § 7121(a) provision that the negotiated grievance procedures of a federal collective bargaining agreement be the "exclusive *administrative* procedures" to resolve grievances precludes an employee from seeking direct *judicial* redress when he would otherwise have an independent basis for judicial review of his claims. 2) Whether the Civil Service Reform Act precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer.

Will v. Hallock

(04-1332)

Ruling Below: *Hallock v. Bonner,* 387 F.3d 147 (2nd Cir. 2004), *cert. granted* 125 S. Ct. 2547 (U.S. June 6, 2005).

Susan Hallock, owner of a computer business, sued numerous government agents and employees, seeking damages arising from the seizure of computer equipment in violation of the Fifth Amendment. The district court had previously dismissed an action to recover for the same wrongful acts due to lack of subject matter jurisdiction. While this first action was pending, Hallock filed a *Bivens* action joining all government agents and employees alleged to have been involved in the seizure of Hallock's property. Following dismissal of the first action, the government filed a motion for judgment on the pleadings, arguing that the judgment in the first action constituted a complete bar to a second action related to the same subject matter. The district court denied this motion and denied the government's application to certify for appeal. The Second Circuit Court of Appeals first held that the collateral order exception applied to the government's interlocutory appeal and allowed the government to appeal the denial of the motion for judgment on the pleadings. The Second Circuit then held that an action brought under the Federal Tort Claims Act and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA, does not result in a judgment in an action under the FTCA. Because the first action was not properly brought under the FTCA, it is a nullity. The Second Circuit concluded, therefore, that a judgment entered on a FTCA claim will constitute a complete bar only if the action was one properly invoking jurisdiction under the FTCA.

Question Presented: 1) Whether a final judgment in an action brought under § 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. § 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim. 2) Did the Court of Appeals have jurisdiction over the interlocutory appeal of the district court's order denying a motion to dismiss under the FTCA's judgment bar, 28 U.S.C. § 2676?