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# Procedural Predictability and the Employer as Litigator: The Supreme Court's 2012-2013 Term

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# Procedural Predictability and the Employer as Litigator: The Supreme Court's 2012-2013 Term

# PROCEDURAL PREDICTABILITY AND THE EMPLOYER AS LITIGATOR: THE SUPREME COURT'S 2012-2013 TERM

*Scott R. Bauries*[*]

ABSTRACT

In this contribution to the *University of Louisville Law Review*'s Annual Carl A. Warns Labor and Employment Institute issue, I examine the Supreme Court's labor and employment-related decisions from the October Term 2012 (OT 2012). I argue that the Court's decisions assisted employers as litigators—as repeat players in the employment dispute resolution system—in two ways. First, the Court established simple contract drafting strategies that employers may use to limit their exposure to employment claims. Second, the Court adopted bright-line interpretations of employment statutes. Both forms of assistance served a formalist interest in what I term "procedural predictability"—enhanced employer predictability and control of both the duration and costs of resolving employment disputes.

## I. INTRODUCTION

In each year of the Roberts Court's tenure, at least one labor and employment law scholar has analyzed the Court's treatment of its labor and employment-related cases.[1] Recent reviews of the Roberts Court's work

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* Robert G. Lawson Associate Professor of Law, University of Kentucky. I would like to thank the organizers of the 30th Annual Carl A. Warns, Jr. Labor & Employment Institute, hosted by the Louis D. Brandeis School of Law at the University of Louisville for inviting me to speak in June 2013, and the editors of the *University of Louisville Law Review* for inviting me to contribute to this issue.

[1] *See* Mark W. Bennett, *Review of Labor and Employment Law Decisions from the U.S. Supreme Court's 2011-2012 Term*, 28 A.B.A. J. LAB. & EMP. L. 169 (2013); Christine Cooper, *Employment Cases from the 2006-2007 Supreme Court Term*, 23 LAB. LAW. 223 (2008); Kenneth G. Dau-Schmidt & Todd Dvorak, *Review of Labor and Employment Decisions from the United States Supreme Court's 2008-2009 Term*, 25 A.B.A. J. LAB. & EMP. L. 107 (2010); Melissa Hart, *Business-Like: The Supreme Court's 2009-2010 Labor and Employment Decisions*, 14 EMP. RTS. & EMP. POL'Y J. 207 (2010); L. Camille Hébert, *The Supreme Court's 2011-2012 Labor and Employment Law Decisions: From the Controversial to the Peripheral*, 16 EMP. RTS. & EMP. POL'Y J. 287 (2012); L. Camille Hébert, *The Supreme Court's 2010-2011 Labor and Employment Law Decisions: A Large and "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279 (2011); Robert J. Rabin, *A Review of the Supreme Court's Labor and Employment Law Decisions: 2005-2006 Term*, 22 LAB. LAW. 115 (2006); Charles A. Shanor, *Employment Cases from the 2007-2008 Supreme Court Term*, 24 LAB. LAW. 147 (2008). Chief Justice John Roberts joined the Court, replacing Chief Justice William Rehnquist, during

have focused often on the Court's ideological or political preferences, as revealed in the outcomes of its cases.[2] But, as Professor Matt Bodie points out, in labor and employment cases, the expected ideological alignments often do not materialize.[3] Moreover, a focus on which party was favored in the Court's ultimate disposition of a case may mask information that is more useful in understanding the Court's work—particularly which parties' interests were ultimately served by a decision, regardless of who prevailed in the case before the Court.

A "liberal" ruling can achieve a "conservative" victory, as we saw recently with the Court's ruling in *National Federation of Independent Business v. Sebelius*.[4] In that case, President Barack Obama's signature health care overhaul, the Patient Protection and Affordable Care Act (Affordable Care Act)[5] was upheld 5–4, but along the way to that ruling, the operative opinion adopted a principle of Commerce Clause jurisprudence that decidedly favored a more limited reach for the federal government—that the Commerce Clause, even read in light of the Necessary and Proper Clause, may not be used to compel participation in a particular commercial market.[6] What is within the state police power for regulating intrastate commerce is therefore outside the federal commerce power,[7] but not because the particular market for health insurance is not an "interstate" one or because selling health insurance is not "commerce"[8]—rather, because the mechanism used *compels*, rather than *prohibits or limits*, conduct within the market.[9]

A researcher interested in "case outcomes" might code the *Sebelius* case as a "liberal" victory, as the ultimate result was to uphold the Affordable Care Act (the signature legislative accomplishment of a

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the 2005-2006 term. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited May 5, 2014).

[2] *See, e.g.*, Cooper, *supra* note 1; Shanor, *supra* note 1.

[3] *See* Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. (forthcoming 2014) (manuscript at 57), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273843; *see also, e.g.*, Shanor, *supra* note 1, at 149 (expressing surprise at the unexpected lineups of justices in each case in the 2007-2008 term, particularly at Justice Scalia dissenting to an opinion favoring the employer).

[4] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[5] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[6] *See Sebelius*, 132 S. Ct. at 2593.

[7] It is clear that states may compel their residents to participate in commerce. *See, e.g.*, KY. REV. STAT. ANN. § 304.39-080(5) (West, Westlaw through 2013 Reg. Sess. & 2013 Extra. Sess.) (requiring the purchase of liability and minimal property damage insurance as a condition of operating a motor vehicle in Kentucky).

[8] *See Sebelius*, 132 S. Ct. at 2591.

[9] *See id.* Although the dissenting Justices emphatically declined to join Chief Justice Roberts's operative opinion on the point, it is clear from the dissent that they would support the application of the Chief Justice's Commerce Clause rule in a subsequent case. *See id.* at 2644–48 (Scalia, J., dissenting).

Democratic president) as a valid exercise of Congress's taxation power.[10] But a more nuanced look at the case reveals that it was as much a long-term victory for conservative proponents of a limited federal government as it was an immediate victory for liberal proponents of universal health coverage.[11] In short, focusing on which side wins or loses a case before the Court has the potential to mask who *really* "wins" as a result of the Court's decision. This latter sense of "wins" refers to the legal actors who ultimately benefit as a result of the principles of law that govern such a decision, rather than the immediate resolution of the case itself. In this sense, just as a "liberal" outcome can mask a "conservative" victory, a particular case outcome favoring an employee can mask an overall victory for employers, and vice versa.

Employers are repeat players in the system of employment dispute resolution.[12] Unlike the average employee, who may become involved in a formal employment dispute that matures into a lawsuit or arbitration once in a career, if at all, employers frequently find themselves in court or in arbitration in disputes with their employees.[13] As repeat players, employers have an interest in seeing the law of employment develop in two ways. First, for obvious reasons, employers have an interest in the adoption of narrow or restrictive interpretations of the civil rights statutes, which lessen the duties they owe to their employees. Second, and perhaps less obviously, employers have an interest in the adoption of bright-line rules of decision in employment cases. Such rules allow employers to predict more accurately the resolution of particular cases, which allows them to predict the likely duration of each dispute, as well as the costs of resolution, including settlement costs.

Narrow interpretations of the statutes' coverage or the duties they impose in the workplace are often difficult to sell politically and judicially, as evidenced by the Court's expansive recent interpretation of the retaliation

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[10] There are numerous such studies. *See, e.g.*, Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 236 n.15 (2009) (collecting studies). Even studies assessing influences beyond political ideology fall victim to this focus on ultimate winners and losers of the instant case—as they must, given the constraints of empirical coding. *See, e.g.*, Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001) (a careful and rigorous study that attempts to account for several interrelated influences on judging but limits its analysis to the winners and losers of particular cases).

[11] *See, e.g.*, Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 47–50 (2013) (arguing that the decision is a continuation of the Rehnquist Court's focus on federalism as a constitutional principle).

[12] Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190 (1997).

[13] *Id.*

provisions of the Civil Rights Act of 1964 to cover those who have not themselves engaged in protected activity, but who are closely related to employees who have engaged in protected activity.[14] But bright-line rules of decision relating to the *proof* of employment claims are just as valuable, and seemingly more palatable to some of the Justices. A bright-line rule of decision may not absolve private employers of their duty not to discriminate, or even limit this duty in any way, but such a rule can make the litigation of employment claims much more predictable—and therefore much less expensive—for employers.

This Article will demonstrate that the OT 2012 cases (with one exception) established bright-line rules of decision that increased the predictability of the duration and costs of resolving employment disputes—what I term "procedural predictability." This pursuit of procedural predictability served the interests of employers as repeat players in the employment dispute resolution system by making that system much more manageable at earlier stages than it was previously. I argue that, in the OT 2012 cases, the Court assisted employers as litigators in two primary ways. First, the Court established formalistic, bright-line rules of decision for contract disputes touching and concerning the workplace.[15] These rules of decision signal to employers the drafting strategies that they may adopt to lessen their costs and time spent resolving employment disputes. Second, the Court adopted formalistic, bright-line rules of decision for employment claims based on civil rights statutes.[16] These rules will have the effect of affording employers more control over statutory disputes at the early stages of each case—thus lessening their costs and time expended. Importantly, these mechanisms operated regardless of whether the employer-side party won each individual case before the Court.

I begin by examining each of the cases that can plausibly be considered a "labor and employment case" on the OT 2012 docket. Then, I show that the principles of law laid down in each of the cases—regardless of which party came out victorious before the Court—greatly favored employers as repeat players, and generally did so by pursuing greater procedural predictability for employers. I conclude with some preliminary thoughts as to the Court's pursuit of procedural predictability as a goal in its decision making.

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[14] *See* Thompson v. N. Am. Stainless, 131 S. Ct. 863, 867, 870 (2011) (unanimously interpreting the Act to extend to the fiancé of the employee who engaged in protected activity, though the employee who engaged in protected activity did not make a retaliation claim herself).

[15] *See infra* Part III.A.

[16] *See infra* Part III.B.

## II. THE OT 2012 LABOR AND EMPLOYMENT CASES

The OT 2012 docket contained very few cases that can properly be termed "labor and employment law cases." The Court did not consider any labor law cases, and its pure employment law cases—those involving principles unique to the employment context—could be counted on one hand. The total of eight Supreme Court decisions at least touching and concerning labor and employment can be usefully divided into two strands. The first strand contains the Court's contract cases.[17] These cases involved employee benefits plans under the Employee Retirement Income Security Act (ERISA) or arbitration contracts, which have long been important to labor law and are increasing in their importance to employment law. The second strand contains the Court's statutory interpretation cases.[18] These cases involved interpretations of Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act (FLSA), and the Civil Service Reform Act (CSRA). I consider the four contract cases before moving on to the four statutory interpretation cases.

### *A. The Contract Cases*

The law of arbitration applies trans-substantively.[19] That is, the case law developed under the Federal Arbitration Act[20] applies regardless of the substance of the underlying dispute that might be arbitrated.[21] Because a good deal of both employment and labor dispute resolution now involves arbitration, the law of arbitration is very important to employment and labor law, and the Supreme Court's three arbitration decisions in OT 2012 will all have effects on the resolution of workplace disputes.

It is plausible to claim that, in enforcing what it calls "a liberal federal policy favoring arbitration,"[22] the Supreme Court has developed a unique

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[17] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064 (2013); US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013); Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012).

[18] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013); Vance v. Ball State Univ., 133 S. Ct. 2434 (2013); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013); Kloeckner v. Solis, 133 S. Ct. 596 (2012).

[19] *Cf.* Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 770 (2012) (calling for a thicker body of federal common law including contract defenses to stabilize this area of law).

[20] Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012).

[21] Yelnosky, *supra* note 19, at 731.

[22] AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

branch of contract law as federal common law.[23] This body of contract doctrine has steadily developed over time to ensure that parties seeking to compel arbitration of their disputes, including employers, are able to access arbitration with less and less trouble. In developing the law in this way, the Court has protected the long-term interests of employers as repeat players in the employment dispute resolution system, and has done so by making both the duration and the costs of employment disputes more predictable for employers. The three arbitration cases the Court decided in the most recent term are no exception to these principles.

The first of these three cases that I will discuss is *Oxford Health Plans, LLC v. Sutter*,[24] decided on June 10, 2013. *Sutter* arose out of an employment arbitration, but the question to be decided was one of general arbitration law, not a question of employment law as a unique doctrinal area.[25] The case had as its background the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[26] holding that class arbitration is only available if the parties have specifically agreed to it in the arbitration agreement.[27] The plaintiff in *Sutter* requested class treatment from the arbitrator, but the contract was silent as to whether the parties agreed to allow such treatment.[28] Nevertheless, the arbitrator interpreted the contract to allow for class treatment.[29] Thus, the question for the Court became whether *Stolt-Nielsen* required explicit, textual agreement or simply an agreement discoverable through contract interpretation, and if the latter, under what circumstances such an interpretation might be reversed on further review.[30]

Oxford Health's argument in the Supreme Court was that *Stolt-Nielsen* required an explicit, textual agreement.[31] The Court, however, unanimously agreed with Sutter and the arbitrator to the contrary.[32] Citing the Court's longstanding practice of recognizing the power of the arbitrator to interpret the arbitration agreement, and deferring substantially to such interpretive decisions,[33] the Court held that the arbitrator's decision that the parties had agreed to class arbitration was not arbitrary or capricious.[34] The Court

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[23] *See* Yelnosky, *supra* note 19, at 730–34.
[24] Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064 (2013).
[25] *Id.* at 2068.
[26] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).
[27] *Id.* at 687.
[28] *Sutter*, 133 S. Ct. at 2067.
[29] *Id.*
[30] *Id.* at 2068.
[31] *Id.* at 2069.
[32] *Id.* at 2066, 2070.
[33] *Id.* at 2070–71.
[34] *Id.* at 2071.

distinguished *Stolt-Nielsen* on the basis that the parties to that case had *stipulated* their failure to reach agreement as to class arbitration,[35] whereas the *Sutter* parties *contested* whether they had reached agreement,[36] thus leaving it to the arbitrator to resolve the point through interpretation.[37]

Another OT 2012 arbitration case that affected employment, while having neither employers nor employees as parties in those capacities, is *American Express Co. v. Italian Colors Restaurant*.[38] In *Italian Colors*, a credit card company included a prohibition against class arbitration explicitly in the agreement it entered with the users of its services.[39] Italian Colors Restaurant and other merchants that accepted American Express charge and credit cards in their establishments sued American Express for using its market power in the area of "charge cards" to force merchants to accept unfavorable terms governing "credit card" transactions.[40] The merchants claimed that this use of market power constituted a "tying" arrangement and was therefore a violation of the Sherman Antitrust Act.[41] They also sought to proceed as a class, despite the language of the identical (in all relevant respects) agreement that each signed with American Express explicitly prohibiting class treatment.[42]

The merchants contended that enforcement of the arbitration prohibition in the agreement would have the impermissible effect of preventing "'effective vindication' of a federal statutory right."[43] The merchants argued that preventing class arbitration of relatively small antitrust claims would place a substantial disincentive on litigating these claims at all, given their small individual values and the marginal costs of litigation.[44] Essentially, their contention was that the expense of litigating even a simple antitrust claim, including the costs of proving that claim

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[35] *Id.* at 2069–70.

[36] *Id.* at 2070.

[37] *Id.*

[38] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[39] *Id.* at 2308 ("The agreement also provides that '[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.'" (quoting *In re* Am Express Merchs. Litig., 667 F.3d 204, 209 (2d Cir. 2012))).

[40] *Id.* Charge cards are less common than credit cards. *See In re Am. Express Merchs. Litig.*, 667 F.3d at 207–08, *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013). The basic difference between the two is that the former does not allow a borrower to carry a balance from month to month. *Italian Colors*, 133 S. Ct. at 2308 n.1. American Express has long been one of the most dominant charge card companies in the world. *See id.* at 2308.

[41] *Italian Colors*, 133 S. Ct. at 2308*; see* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012). A "tying" arrangement essentially forces those who want one product to also purchase another product, or to purchase it on less favorable terms than would be offered if the purchase of the more desirable product were not "tied" to its purchase. *See In re Am. Express Merchs. Litig.*, 667 F.3d at 208 n.4.

[42] *Italian Colors*, 133 S. Ct. at 2308.

[43] *Id.* at 2310.

[44] *Id.*

through economic expert witness testimony, would prevent the litigation of any such simple claim from being economically beneficial to the plaintiff, even if victorious.[45] But the Court rejected this contention as a basis for voiding the anti-class provision.[46]

The majority read the "effective vindication" exception as a narrow prohibition on the enforcement of class arbitration waivers where such waivers remove a party's "*right to pursue*" a statutory violation completely, such as where a class arbitration waiver contains an explicit, prospective waiver of the statutory right itself, or imposes a confiscatory fee for the arbitration.[47] In the case before the Court, none of the parties would have been completely prevented from "pursuing" their claims—it just would not make economic sense for them to do so.[48] Accordingly, the "effective vindication" exception was inapplicable.[49]

The final arbitration case, *Nitro-Lift Technologies, L.L.C. v. Howard*,[50] like *Sutter*, arose out of the employment context—this time in relation to a post-employment non-competition agreement.[51] *Nitro-Lift*, unlike the other cases reviewed here, was a short, unanimous, per curiam opinion.[52] The case presented a dispute between a service provider to oil and gas well operators operating in Oklahoma, Texas, and Arkansas and two employees.[53] Both employees had signed employment agreements with Nitro-Lift that prevented them from working for competitors of Nitro-Lift for a period of time after their separation from employment with Nitro-Lift.[54] Despite the agreements, both employees resigned from Nitro-Lift and went to work for one of its competitors shortly thereafter.[55]

Soon after learning of their new employment, Nitro-Lift served both former employees with demands for arbitration.[56] In response, the employees filed their own suit in state court in Oklahoma, seeking a judicial declaration that their employment agreements were invalid and unenforceable.[57] The trial court dismissed, citing the arbitration clause, but

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[45] *Id.* at 2308.
[46] *Id.* at 2310.
[47] *Id.* at 2310–11 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).
[48] *Id.* at 2310.
[49] *Id.*
[50] Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012).
[51] *Id.* at 501–02.
[52] *Id.* at 501.
[53] *Id.* at 501–02.
[54] *Id.*
[55] *Id.* at 502.
[56] *Id.*
[57] *Id.*

the Oklahoma Supreme Court reversed, holding that the existence of an arbitration clause in a non-competition agreement cannot deprive the state's courts from deciding whether the agreement comports with the public policy of the state.[58] The court went on to hold that both agreements were void as against the public policy of Oklahoma.[59]

Nitro-Lift appealed the Oklahoma Supreme Court's ruling to the Supreme Court, which unanimously vacated the court's decision in a per curiam opinion.[60] Citing *Preston v. Ferrer*,[61] the Court applied the established rule that, while challenges to the enforceability of a specific provision mandating arbitration must be decided by a court, challenges to the enforceability of the overall agreement itself must be decided by the arbitrator.[62] The challenge in *Nitro-Lift* was to the enforceability of the non-competition restrictions, not the arbitration provision itself.[63] Thus, the Court rejected any "public policy" exception to the "arbitrator decides" rule.[64]

ERISA[65] has provided the Court with opportunities to engage both its statutory interpretation function and its pure federal common lawmaking function. Over time, the Court has developed a common law jurisprudence of both contract law and general equity law as a way of implementing the requirements of ERISA. OT 2012 provided the Court with an opportunity to clarify the extent to which the Court will allow equitable doctrines to affect the enforcement of the sorts of contracts falling under ERISA's preemptive umbrella—employee benefit plans.

In *US Airways v. McCutchen*,[66] the plaintiff, McCutchen, was injured and secured health benefits in the amount of $66,866 through his employer's benefits plan (the Plan), which was covered by ERISA.[67] McCutchen then sued the third party who injured him, recovering $110,000.[68] After attorneys' fees and costs, the plaintiff was left with

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[58] *Id.* (quoting Howard v. Nitro-Lift Techs., L.L.C., 273 P.3d 20, 26 n.20, 27 (Okla. 2011), *vacated*, 133 S. Ct. 500 (2012)).

[59] *Id.*

[60] *Id.* at 501.

[61] Preston v. Ferrer, 552 U.S. 346, 353–54 (2008) (holding that challenges to the validity of a contract containing an arbitration agreement must be heard by the arbitrator); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–404 (1967) (establishing the same rule for cases filed in federal courts).

[62] *Nitro-Lift*, 133 S. Ct. at 503.

[63] *Id.* at 502.

[64] *Id.* at 503.

[65] Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2012).

[66] U.S. Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

[67] *Id.* at 1543.

[68] *Id.*

$66,000—$866 less than the Plan had paid out in benefits.[69] Under the clear terms of the ERISA Plan, if an injured employee were to sue the third party and recover more than the Plan expended for his care, the Plan was entitled to recover all of its expenses from the injured employee, regardless of the employee's ultimate net recovery after paying attorneys' fees and costs.[70] As the Court stated, this provision imposed an "equitable lien by agreement" on the lawsuit proceeds, so the scope of the lien was best determined by the language of the agreement, in this case, the ERISA Plan.[71] The Court's resolution first applied the clear terms of the Plan to award the Plan all of its expenses ($866 of which had to come out of McCutchen's pocket).[72] That portion of the opinion was unanimous.[73]

But a 5–4 majority also found that the plan was "silent" as to how attorneys' fees and costs were to be split among the parties in the event of a third party suit and recovery.[74] This silence required the Court to interpret the Plan in light of the equitable nature of the lien by agreement,[75] and the majority applied the "common fund" doctrine familiar to trust law to allocate the costs of recovery proportionally.[76] Four justices dissented on this point, explaining that the case had come to the Court on the parties' mutual stipulation that the terms of the plan were "unambiguous," and that it was therefore an overreach to apply any doctrines of interpretation, including the common fund doctrine.[77]

### *B. The Statutory Interpretation Cases*

The remaining four cases on the OT 2012 docket were statutory interpretation cases (though one of them involved no interpretation at all).[78] Two of these cases dealt with the proof requirements for violations of Title VII, while the other two considered issues relating to subject matter jurisdiction under the FLSA and the CSRA.

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[69] *Id.*

[70] *Id.*

[71] *Id.* at 1546.

[72] *Id.* at 1548.

[73] *See id.* at 1551 (Scalia, J., dissenting) (stating the dissenters' agreement with Parts I and II but disagreement with Parts III and IV).

[74] *Id.* at 1543 (majority opinion). Under the common fund doctrine, "someone 'who recovers a common fund for the benefit of persons other than himself' is due 'a reasonable attorney's fee from the fund as whole.'" *Id.* at 1550 (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).

[75] *Id.* at 1549.

[76] *Id.* at 1550–51.

[77] *Id.* at 1551 (Scalia, J., dissenting).

[78] *See infra* notes 162–188 and accompanying text (discussing Kloeckner v. Solis, 133 S. Ct. 596 (2012)).

To begin, the Court decided two cases under Title VII,[79] one involving a federal judge-made affirmative defense and the other involving a standard of causation. The first, *Vance v. Ball State University*,[80] asked the Court to determine whether a plaintiff's co-worker who had some authority to assign tasks to the plaintiff and otherwise direct her work activities qualified as a "supervisor" for the purposes of the *Faragher-Ellerth*[81] affirmative defense to a hostile work environment claim under Title VII.[82] The second, *University of Texas Southwestern Medical Center v. Nassar*,[83] asked the Court to decide whether the "mixed motive" framework of causation initially developed in *Price Waterhouse v. Hopkins*,[84] and later codified in the Civil Rights Act of 1991,[85] could be applied to a retaliation claim under Title VII.[86]

Maetta Vance, a cafeteria employee at Ball State University, alleged that another cafeteria worker named Saundra Davis had harassed her based on her race.[87] When the University learned of the alleged harassment through Vance's complaints, it acted to resolve the matter, but the alleged harassment continued.[88] Vance filed suit, and the District Court held, on cross-motions for summary judgment, that the University had acted reasonably in attempting to stop the behavior of Davis that constituted the alleged harassment.[89]

The default rule of employer liability in harassment cases under Title VII is one of *direct* liability for negligence on the employer's own part.[90] An employer is liable for harassment perpetrated by one of its employees *only if* it knows or should know of harassment and does not act promptly and reasonably to protect the victim of the harassment.[91] So, based on the University's reasonable actions in attempting to remedy the alleged

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[79] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e17 (2012).

[80] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

[81] *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

[82] *Vance*, 133 S. Ct. at 2443.

[83] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[84] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[85] Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012).

[86] *Nassar,* 133 S. Ct. at 2522–23.

[87] *Vance*, 133 S. Ct. at 2439.

[88] *Id.* at 2440.

[89] *Id.*

[90] Katherine S. Anderson, Note, *Employer Liability under Title VII for Sexual Harassment after* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1262 & n.30 (1987).

[91] *See* 29 C.F.R. § 1604.11(d) (1999) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

harassment after Vance complained, the University could not be held liable for Davis's allegedly harassing acts.[92]

But this default rule applies only to the actions of "co-employees" of the plaintiff.[93] Under the *Faragher-Ellerth* doctrine, if the alleged harasser is the supervisor of the alleged victim, then based on agency principles, *vicarious* liability applies.[94] There is, however, a potential affirmative defense to such liability.[95] Where harassment culminates in a "tangible employment action," such as termination, there is no affirmative defense to it, as this is the familiar and especially pernicious form of harassment known as "quid pro quo" harassment, which can never be justified.[96] But where the plaintiff complains of a hostile work environment that did not culminate in a tangible employment action, an employer can establish an affirmative defense against vicarious liability if the employer proves (1) that it acted reasonably to prevent and promptly remedy any harassment, and (2) that the employee-victim "unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[97] That is, the *employer* bears the burden of proving that *its own* actions were reasonable—both as to preventing harassing conduct and promptly remedying it once aware of it—and the *employer* must additionally prove that *the employee acted unreasonably* in reporting the alleged harassment or taking other steps to prevent or stop it.[98]

Vance was not terminated, reassigned, or demoted, but Vance did contend that Davis was her supervisor, rather than a co-employee, in an effort to force the University to prove the *Faragher-Ellerth* affirmative defense to escape liability.[99] The University disputed the claim that Davis was Vance's supervisor, and that was the issue on which the Court granted certiorari.[100] Vance contended that the Court should examine whether Davis was her supervisor based on the particular facts of their working relationship.[101] Davis, at times, assigned work to Vance and directed her duties, thus exercising at least some managerial control over Vance.[102] The

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[92] *Vance*, 133 S. Ct. at 2440.

[93] Anderson, *supra* note 90, at 1262.

[94] *Vance*, 133 S. Ct. at 2442. For a comparative introduction to direct and vicarious liability, see James Fleming, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161 (1954).

[95] *Vance*, 133 S. Ct. at 2442.

[96] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998); Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 762 (1998).

[97] *Vance*, 133 S. Ct. at 2439 (citing *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).

[98] *Id.*

[99] *Id.* at 2439–40.

[100] *Id.* at 2443.

[101] *Id.* at 2449.

[102] *Id.*

Equal Employment Opportunity Commission's (EEOC's) most recent interpretation of the term "supervisor" was also in accord with Vance's desired approach.[103]

But the Supreme Court adopted the simpler, more formalistic approach advanced by the University.[104] Under the approach the Court adopted, the only inquiry a court must make in determining whether an alleged harasser was the supervisor of the victim is whether the alleged harasser had the authority "to take tangible employment actions against the victim."[105] Such actions might include anything that "effect[s] a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or . . . a significant change in benefits."[106] In *Vance*, the alleged harasser, Davis, had some authority to direct Vance's work activities, but had no authority to hire her, fire her, reassign her, promote her, or change her benefits.[107] Therefore, Davis was merely Vance's co-employee, rather than her supervisor, eliminating the possibility of vicarious liability.[108] And because the University acted reasonably to protect Vance once it was alerted to her complaints, the University therefore was not directly liable for any harassment that Davis might have committed.[109]

The other Title VII case, *Nassar*, also involved a university employer.[110] Nassar, a doctor at a university-affiliated hospital, complained to his employer that his supervisor, Dr. Beth Levine, discriminated against him based on his religion and his ethnic heritage.[111] After lodging these complaints, Nassar approached the University's partner institution, Parkland Memorial Hospital, about continuing to work for Parkland (under different supervisors) as a staff physician, while discontinuing his affiliation

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[103] *Id.* ("In its Enforcement Guidance, the EEOC takes the position that an employee, in order to be classified as a supervisor, must wield authority 'of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.'"). Importantly, as to its Enforcement Guidance, the EEOC is not entitled to the normal deference associated with administrative rulemaking under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1189 (2008). Rather, because Congress did not specifically authorize the EEOC to enact interpretive regulations under the relevant portions of Title VII, the EEOC's interpretations are entitled only to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), meaning that, instead of deferring to any "reasonable" interpretation, the Court will only defer to "persuasive" interpretations. Eskridge & Baer, *supra*.

[104] *Vance*, 133 S. Ct. 2450.

[105] *Id.* at 2439.

[106] *Id.* at 2443 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

[107] *Id.* at 2439, 2449.

[108] *Id.* at 2454.

[109] *See id.*

[110] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

[111] *Id.*

with the University of Texas as a faculty member.[112] Administrators at Parkland allegedly assured him that this was possible.[113] Though this assurance was not a formal job offer, Nassar resigned his position on the University faculty.[114] Importantly, in tendering his resignation, Nassar sent a letter both to Levine's supervisor, Dr. Fitz, and to some other employees of the University, restating his prior complaints of discrimination based on religion and ethnic origin.[115] Thereafter, Parkland formally offered Nassar the job, but then revoked the offer upon learning from Dr. Fitz that such an arrangement would be inconsistent with the affiliation agreement between Parkland and the University.[116] Nassar filed suit claiming that Dr. Fitz's intervention leading to the revocation of the offer constituted retaliation against Nassar for opposing unlawful discrimination.[117]

The existence of the agreement between the University and Parkland did in fact justify the revocation of Nassar's offer because it required Parkland doctors to be members of the University's faculty.[118] But around the time he alerted Parkland to this feature of the agreement, Fitz had allegedly also stated a desire to clear Levine's name.[119] Thus, it was unclear whether Fitz admonished the Hospital to withdraw the offer due to a desire to follow the affiliation agreement strictly, or due to a desire to retaliate against Nassar for his complaints of discrimination.[120] Because some evidence of each motive existed, the question presented for the Court was whether a retaliation claim under Title VII requires proof of "but for" causation, or whether it is sufficient to prove that a retaliatory motive was one "motivating factor" among other legitimate causes of the challenged decision.[121]

The Court held that "but for" causation is required.[122] The majority explained that Congress's failure to explicitly include claims for retaliation within its 1991 amendment to Title VII allowing for "motivating factor" causation meant that the amended standard did not apply to such claims.[123] In other words, and consistent with the Court's reading of congressional

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[112] *Id.* at 2523–24.
[113] *Id.*
[114] *Id.* at 2524.
[115] *Id.*
[116] *Id.*
[117] *Id.*; *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012) (making actionable retaliation against an employee for opposing unlawful discrimination).
[118] *See Nassar*, 133 S. Ct. at 2523.
[119] *Id.* at 2524.
[120] *See id.* at 2523–24.
[121] *Id.* at 2522–23.
[122] *Id.* at 2534.
[123] *Id.* at 2529.

intent in the recent age discrimination case of *Gross v. FBL Financial Services Inc.*,[124] the decision of Congress to direct the "motivating factor" language in the 1991 amendment to Title VII at unlawful employment practices involving discrimination based on race, color, religion, sex, and national origin, without mentioning retaliation, evidenced congressional intent to exclude retaliation claims from the new "motivating factor" standard.[125]

The Court also read the promulgation of the 1991 amendments as inconsistent with the continued application of *Price Waterhouse* outside the unlawful employment practices that are the subject of the 1991 amendments.[126] In the majority's view, Congress's decision to amend the statute specifically to adopt in part and alter in part the *Price Waterhouse* framework was a sufficient indication of its intent to displace the federal common law framework with a statutory one, and the limits of that statutory framework should be determined based on the statute.[127] Thus, the "mixed motive" framework is now limited solely to the status-based discrimination prohibitions found in Title VII.[128]

The Court also decided two cases in which it formulated decision rules relating to subject matter jurisdiction under the federal employment statutes. *Genesis Healthcare Corp. v. Symczyk*,[129] the first of these two cases, presented a question of mootness under the collective action provisions of the FLSA.[130] The case involved the increasingly common practice of using full settlement of an individual claim to "pick off" the named plaintiff in a putative collective action under the FLSA to prevent the certification of the collective action.[131] Laura Symczyk sued her employer under the FLSA seeking to recover for deductions of break time from her pay even though she was sometimes required to work during her break.[132] She made her claim on behalf of herself, as well as on behalf of others similarly situated, thus making the claim a putative collective action.[133]

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[124] Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).

[125] *Nassar*, 133 S. Ct. at 2529.

[126] *Id.* at 2534.

[127] *Id.*

[128] *See id.*

[129] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

[130] *Id.* at 1526; *see also* Fair Labor Standards Act, 29 U.S.C. § 216(b) (2012).

[131] *Symczyk*, 133 S. Ct. at 1527; *see also* 29 U.S.C. § 216(b) (providing for collective actions, and requiring that the non-named plaintiffs opt into the class, as opposed to forming the class through a certification ruling by the judge and allowing non-named plaintiffs to opt out, as would be the case under a typical class action under Federal Rule of Civil Procedure 23(b)(3)).

[132] *Symczyk*, 133 S. Ct. at 1527.

[133] *Id.*

Under the more conventionally familiar procedures of the Rule 23(b)(3) consumer class action, a plaintiff representative is required to procure the court's approval to certify the class, and then is required to provide each member of the class with notice of the action and of the member's right to opt out of the class and pursue relief individually.[134] The collective action provisions of the FLSA, in contrast, require that any non-named plaintiff wishing to participate in a collective action affirmatively file a notice opting *into* the plaintiff class, meaning that no class exists until at least one employee other than the plaintiff has opted in.[135] At the time that Symczyk filed her suit, no other employee had opted into the action.[136] The addition of even one absent employee to the suit through her filing of an affirmative notice opting into the suit would have allowed at least a putative class to form.[137] But before any of Symczyk's co-employees could opt into the class, the employer presented Symczyk with a Rule 68 Offer of Judgment (a formal settlement offer).[138] The employer offered Symczyk all of the relief to which she claimed to be entitled in exchange for dropping the suit.[139] However, the employer's offer, on its own terms, expired ten days later when Symczyk failed to accept or reject it.[140]

Ordinarily, this failure to accept the offer should have placed Symczyk in the same position as she would have been in if the offer had not been made, other than exposing her to potential penalties under Rule 68.[141] Nevertheless, in the district court, Symczyk conceded that her failure to accept the settlement offer rendered her individual claim moot.[142] On appeal, the Third Circuit affirmatively ruled, based on circuit precedent, that Symczyk's claim was mooted by the expired offer.[143] In the Supreme Court, however, Symczyk did not file a cross-petition on the issue.[144] Based on these acts of waiver (in the district court) and abandonment (in the Response to the Petitioner's Brief), the majority assumed the mootness of Symczyk's individual claim, and isolated the issue to one of "whether [a

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[134] FED. R. CIV. P. 23(b)(3).
[135] 29 U.S.C. § 216(b).
[136] *Symczyk*, 133 S. Ct. at 1527.
[137] *See* 29 U.S.C. § 216(b).
[138] *Symczyk*, 133 S. Ct. at 1527; *see also* FED. R. CIV. P. 68.
[139] *Symczyk*, 133 S. Ct. at 1527.
[140] *Id.*
[141] *See* FED. R. CIV. P. 68(d) ("If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.").
[142] *Smczyk*, 133 S. Ct. at 1529.
[143] *Id.*
[144] *Id.*

putative collective action under the FLSA] is justiciable when the lone plaintiff's individual claim becomes moot."[145]

The Court held that the collective action cannot proceed under such circumstances.[146] Important to this resolution was the fact that, at the time of the offer's expiration, no other employee had yet opted to become part of the suit.[147] Taking Symczyk's individual claim as moot, then, the Court distinguished FLSA collective actions, in which no class has any legal significance until an absent employee affirmatively opts into the class, from traditional Rule 23(b)(3) class actions, in which the class's interests acquire independent legal significance as soon as certification is granted.[148] Given the lack of independent legal significance of the collective interests of Symczyk's absent co-workers, the Court held that Symczyk lacked a personal stake in the controversy tied to litigating on behalf of them.[149] Therefore, since her own individual claim was moot, the suit no longer presented a live case or controversy.[150]

The other subject matter jurisdiction case was much simpler. *Kloeckner v. Solis*[151] presented only an issue of original subject matter jurisdiction under the CSRA,[152] and it therefore will affect only the initial decision of where to file a lawsuit against a federal government employer, rather than any substantive decision governing actions in the federal workplace or any procedural decision of how to proceed in or prove an employment case after filing.[153] Moreover, the issue of original subject matter jurisdiction the Court resolved in the case only affects appeals from decisions of the Merit Systems Protection Board (MSPB) in what are termed "mixed cases," and only the subset of those cases that the MSPB dismisses on procedural grounds.[154] The Court in *Kloeckner* merely applied the very clear text of the CSRA, rejecting an alternative reading that would have found a non-textual exception, so the Court did not really even formulate a decision rule in the case through interpretation.[155] Thus, in the grand scheme of the Court's employment law docket, it was, at best, a minor decision.

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[145] *Id.* at 1526.
[146] *See id.* at 1529.
[147] *Id.*
[148] *Id.* at 1530.
[149] *Id.* at 1530–32.
[150] *Id.* at 1532.
[151] Kloeckner v. Solis, 133 S. Ct. 596 (2012).
[152] Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101–1105 (2012).
[153] *See Kloeckner*, 133 S. Ct. at 604.
[154] *Id.* at 601–02.
[155] *Id.* at 603–04.

Nevertheless, it was a decision of the Court in the most recent term, so it belongs among the cases reviewed here.

Carolyn Kloeckner, an employee of the federal Department of Labor (DOL), filed a charge of discrimination with the EEOC, claiming that she had been subjected to a hostile work environment based on her sex and age.[156] At the time she filed her suit, her case did not fall under the jurisdiction of the MSPB, the administrative entity responsible for adjudicating the claims of federal employees subjected to serious employment actions, such as demotion or termination.[157] Shortly thereafter, however, the DOL terminated her employment.[158]

This termination was for cause, and was therefore subject to the review of the MSPB.[159] However, in addition to her challenge of the cause determination, Kloeckner claimed that she had been terminated based on her sex, age, or both.[160] The combination of these two arguments made the case a "mixed case"—one that involves both the cause-based protections of the CSRA and the status-based protections of Title VII.[161] At this point, Kloeckner had a choice: she could continue with her prior EEOC charge as to the alleged hostile work environment and simultaneously pursue her MSPB mixed case, or she could litigate them one at a time.[162]

To conserve her discovery expenses, Kloeckner opted to pursue the EEOC charge first.[163] She requested leave to amend her EEOC charge to include her discriminatory termination claim, and she asked the MSPB to dismiss her case without prejudice for four months to allow that process to come to a resolution.[164] Both requests were granted.[165] The MSPB dismissed her mixed case without prejudice to her ability to re-file by the *earlier* of January 18, 2007, or 30 days after a final decision in her EEOC case.[166]

Kloeckner's EEOC case was not resolved until long after her January 18, 2007 deadline, when the EEOC administrative law judge dismissed her

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[156] *Id.* at 602. For the general procedures for filing such claims, see 29 C.F.R. §§ 1614.105–.106 (2009).

[157] *Kloeckner*, 133 S. Ct. at 602.

[158] *Id.*

[159] *Id.*; *see* 5 U.S.C. § 1221(a) (2012) (providing for MSPB review of tangible employment actions involving job performance).

[160] *Kloeckner*, 133 S. Ct. at 602.

[161] *Id.*; *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (prohibiting discrimination based on race, color, religion, sex, and national origin).

[162] *Kloeckner*, 133 S. Ct. at 602.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

case as a sanction for bad-faith discovery conduct and remanded it to the DOL for a final decision.[167] Once that decision was issued, Kloeckner sought review before the MSPB.[168] But the MSPB treated Kloeckner's appeal as an improper attempt to re-open her earlier mixed case long after her right to re-file had expired and dismissed it as untimely.[169] Kloeckner then filed suit in the District Court for the Eastern District of Missouri, but the court dismissed the case for lack of subject matter jurisdiction, holding that Kloekner was required to file her suit initially in the United States Court of Appeals for the Federal Circuit, pursuant to the MSPB review provisions of the CSRA.[170]

The CSRA provides for two avenues of review for a MSPB determination.[171] The first applies to general decisions of the MSPB reviewing tangible employment actions.[172] This avenue requires that an action seeking review of the MSPB's determination be filed directly in the Federal Circuit.[173] However, the relevant exception to this general rule requires that, where a federal employee brings a mixed case, that employee must seek review of the MSPB's determination initially in the local federal district court.[174]

The Government (as employer) contended that, despite the clear exception to the Federal Circuit filing requirement for mixed cases, Kloeckner was required to file initially in the Federal Circuit because the MSPB had dismissed her appeal for procedural reasons, rather than on the merits.[175] The Court unanimously rejected this contention based on the complete absence of any language in the statute drawing such a distinction.[176] Ultimately, this decision may have made it marginally more expensive for federal employers to litigate mixed cases rejected by the

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[167] *Id*. at 602–03.

[168] *Id.* at 603.

[169] *Id.*

[170] *Id.*; *see also* Kloeckner v. Solis, No. 4:09CV804–DJS, 2010 WL 582590, at *4 (E.D. Mo., Feb. 18, 2010).

[171] *See* 5 U.S.C. § 7703(a)–(b) (2012).

[172] *Id.* § 7703(b)(1)(A).

[173] *See id.* ("Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit.").

[174] *See id.* § 7703(b)(2) ("Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable."). This language cross-references the filing requirements for rights of action under Title VII, the ADEA, and the FLSA, all of which confer original subject matter jurisdiction on the federal district courts.

[175] *Kloeckner*, 133 S. Ct. at 604.

[176] *Id.* at 605.

MSPB on procedural grounds,[177] but in the grand scheme of employment litigation, it was of little significance.

So, the Court decided eight cases touching and concerning labor and employment. One of these cases was of so little consequence that it is difficult to draw any lessons from it other than that statutes mean what they say. The other seven, I will contend in the next Part, served an interest in procedural predictability, and did so to the great benefit of employers as repeat players in the employment dispute resolution system.

## III. PROCEDURAL PREDICTABILITY AND EMPLOYERS AS REPEAT PLAYERS

As descriptive theory of the Court's OT 2012 work, and as a complement to the existing accounts of the Roberts Court's jurisprudence in labor, employment, and business litigation,[178] I seek in this Part to outline what I see as a governing principle for the Court's working majorities in OT 2012. I call this principle "procedural predictability." This Part will show that a concern for procedural predictability—defined as the ability to know at the earliest stage possible at what stage a dispute will resolve, and what it will cost to resolve that dispute—animated almost all of the Court's OT 2012 decisions. Further, the application of this principle overwhelmingly favored employers as repeat players in the employment dispute resolution system, regardless of whether the employer- or employee-side party prevailed in each case before the Court.

Legal formalists such as Justice Antonin Scalia have long extolled the virtues of "a law of rules," or the setting down of bright-line rules of decision to guide legal actors.[179] Most such accounts defend formalist rule development in part as protecting legal actors from uncertainty by fostering

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[177] It is plausible that the federal government, in its role as a repeat player in the system of employment dispute resolution, lost both the immediate decision in *Kloeckner* and the long-term benefits associated with the position it took in the case. Most plausibly, forcing all purely procedural-based, mixed case MSPB decisions for review into the Federal Circuit could have saved the Government some time and expense associated with litigating cases in local district courts, but the time and expense saved, if any, would not likely be very great, especially considering that all merits-based, mixed case MSPB decisions would still have to be reviewed in the local federal district courts. *See supra* notes 156–77 and accompanying text (discussing the *Kloeckner* decision).

[178] *E.g.*, Bodie, *supra* note 3; Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997 (2009); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); David L. Franklin, *What Kind of Business-Friendly Court?: Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019 (2009).

[179] *E.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (introducing predictability as a justification for a rule-based jurisprudence: "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.").

predictability in the law.[180] The sort of predictability that is most often the subject of these accounts is the predictability that legal actors enjoy in ordering their affairs outside the litigation context—what Justice Harlan called "primary conduct."[181] The constitutional doctrine of vagueness as a means of voiding statutes operationalizes this concern for predictability by requiring that statutes allow a person of ordinary intelligence to be able to discern what conduct they require or proscribe.[182] In employment law, common law doctrines such as the now-disfavored "fellow servant" rule have attempted to serve this same interest in predictability in ordering one's daily affairs.[183]

In the Court's recent labor and employment decisions, however, a different concern for predictability is at work. The Court does not attempt to clarify duties and rights under the law so that employers and employees will know how to act toward one another in the workplace, or so that they know what to expect from each other. Rather, the Court seems much more concerned with formulating and clarifying rules of decision, so that employers will know, at an early stage in each case, whether they will be likely to win or not, how long it will take to win, and how much it will cost to litigate to a resolution. The cases therefore evidence a strong preference in the Court's majorities for simplifying and shortening employment cases, and little interest in tampering with the substantive duties and rights the underlying claims advance.

To be sure, the individual outcomes of the remaining OT 2012 cases favored the employer parties by almost a two-to-one margin. Employer-side litigants won five of the eight cases reviewed above (*Italian Colors*, *Nitro-Lift*, *Vance*, *Nassar*, and *Symczyk*), but the employee-litigants won the other three (*Sutter*, *McCutchen*, and *Kloeckner*). And, excluding *Kloeckner* (as either neutral or only speculatively harmful to the federal government as an employer), the long-term litigation interests of employers as repeat players in the employment dispute resolution system were favored in every case. In each case, the Court, either explicitly in its reasoning or implicitly in the rules it adopted, pursued a greater level of procedural predictability

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[180] *Id.*

[181] Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring). For an argument along these lines, see, for example, Scalia, *supra* note 179, at 1179: "As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean."

[182] Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284 (2003).

[183] John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 653 (2000) (discussing the fellow-servant doctrine as one aimed at "rule-like certainty," but one undermined by numerous shifting exceptions).

for employer-litigators. A close look at the cases will illustrate how this occurred. I begin with the contract cases.

### *A. Procedural Predictability in the Contract Cases*

The Court pursued procedural predictability in its contract cases not by uniformly deciding such cases in favor of the employer-side parties.[184] In fact, half of the four contract drafting cases were decided in favor of the employee-side litigants.[185] Rather, the Court pursued procedural predictability by illustrating through the opinion in each case contract drafting strategies that, if employed, would have the effect of reducing the costs for employers in future litigation.

Beginning with *McCutchen*, the Court's lone ERISA case, recall that the employee prevailed on his argument that principles of equity demanded that his litigation costs be shared proportionally between the Plan and him.[186] A close look at the Court's opinion, however, reveals that McCutchen's victory masked a more important victory for employers (in this case the employer as benefits plan administrator) as repeat players. McCutchen's success at having the common fund doctrine applied to his litigation costs depended on the majority's conclusion that the Plan was "silent" as to the allocation of such costs.[187] As to the Plan's right to reimbursement itself, the Court unanimously applied the explicit terms of the Plan, even where such application had the effect of taking money out of McCutchen's own pocket.[188]

Because a majority of the Court found (contrary to the parties' stipulation that the Plan was unambiguous) that the Plan was "silent" as to allocation of litigation costs, McCutchen was able to overcome the Plan's harsh explicit language regarding reimbursement.[189] But the decision sends a very clear signal to employers. If employers and benefit plan administrators want to recover their expenses on covered health items out of the proceeds of the insured's litigation without having to assume a proportional share of the expenses, all they need do is draft the plan so that it is not "silent" as to the allocation of such expenses. In other words, the unanimous portion of the Court's decision stands for the proposition that

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[184] *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064 (2013); US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013); Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012).

[185] *See Sutter*, 133 S. Ct. at 2071; *McCutchen*, 133 S. Ct. at 1551.

[186] *See supra* notes 66–77 and accompanying text (discussing *McCutchen*).

[187] *McCutchen*, 133 S. Ct. at 1543.

[188] *Id.*

[189] *Id.* at 1548–51.

the Court will apply the explicit language of an ERISA plan, even if applying such language as written works a grave injustice on the insured,[190] and the non-unanimous portion applying equity depends on the conclusion that the Plan is silent, and therefore ambiguous, on an important term.[191]

Considering this unanimous holding in light of the majority's finding that the Plan was "silent" about the allocation of costs, then, the message to employers is clear—draft your plans with clear allocation-of-costs provisions, and they will be enforced as written, regardless of the injustice that may result to the insured employees.[192] Thus, in handing an equity-based victory to McCutchen, the Court pointed the way for employers and benefit plan administrators to manage their litigation costs and increase the predictability of their ultimate success when they must sue their covered employees for reimbursement. The Court did this in one way or another in all of its contract cases in OT 2012. The remaining cases of this type all involved arbitration contracts, but each case in one way or another served the interests in procedural predictability held by employers as repeat players in the employment dispute resolution system.

*Sutter*'s resolution of a thorny issue created by a recent Supreme Court arbitration decision redounds to the benefit of employers as repeat players. Recall that the Court held in *Stolt-Nielson* that the parties to an arbitration agreement must specifically agree to permit class arbitration in order for the plaintiff to proceed on behalf of others in an arbitration.[193] Under *Sutter*, the rule of "specific agreement" set forth in *Stolt-Nielson* was clarified—"specifically" does not necessarily mean "explicitly."[194] The rule of *Sutter* requires only that the parties' agreement can be *interpreted* to allow for class arbitration, not that the agreement contain a specific provision *explicitly* permitting class arbitration.[195]

Employers, therefore, may not count on the absence of any language in the agreement relating to class treatment to prevent class arbitration. Rather, to avoid class arbitration, employers must include a provision in the arbitration agreement stating that the parties have not come to terms on class arbitration, or that no portion of the agreement should be read to authorize class arbitration, or even more certainly, that class arbitration is not permitted under the agreement.

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[190] *Id.* at 1546.
[191] *Id.* at 1551.
[192] *Id.*
[193] *See* Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010).
[194] *See* Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064, 2070 (2013).
[195] *See id.*

Thus, although the arbitrator's interpretation of the parties' agreement to allow for class arbitration was upheld under the specific facts of the *Sutter* case, the Court illuminated a clear path for employers to avoid the same result in all future cases. Given the well-known imbalance in negotiating power between employers and employees,[196] it is a virtual certainty that employment agreements and employment handbooks around the country will be amended as a result of *Sutter* to include explicit language prohibiting class arbitration, and that class arbitration in the employment context will become a thing of the past. In terms of employers' interests in procedural predictability, then, the *Sutter* decision constitutes another long-term victory, even though the employer-party lost the case.

In *Italian Colors*, where no employer or employees were even parties standing in those roles, the interests of employers as repeat players also prevailed. The rule the Court adopted—that enforcing a class arbitration prohibition even where individual litigation is cost-prohibitive does not prevent the "effective vindication of a federal statutory right"[197]—will greatly benefit employers as repeat players. Under *Italian Colors*, most employees' "effective vindication" arguments will fail unless employers overreach and seek to secure prospective waivers of employees' statutory rights or impose confiscatory fees.[198]

Read together, then, *Sutter* and *Italian Colors* create a very robust protection for explicit provisions in employment agreements prohibiting class arbitration. It seems that such provisions will be enforced as written, even where they appear to leave employees with largely illusory rights to litigate individually. Thus, employers' interests in procedural predictability are now under the employers' own protection—they need only draft their class arbitration prohibitions carefully and explicitly, and they will be able to avoid litigating in the aggregate.

The Court's unanimous rejection in *Nitro-Lift* of a state court's public policy-based exception to the rule that the arbitrator decides all issues of enforceability, save those regarding enforceability of the arbitration provision itself, only reinforces this system of alternative dispute resolution that affords employers significant control over their litigation costs.[199] All

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[196] *See, e.g.*, Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 3–4 (2001) (describing the change in courts' assumptions during the turn of the twentieth century, from an assumption of equal bargaining power between employers and employees, to one of unequal bargaining power).

[197] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

[198] *See id.* at 2310–11.

[199] *See* Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 503–04 (2012).

employers must do now is adjust their drafting practices, and they will be able to secure the arbitrability of their substantive agreements, to forestall the most expensive and protracted litigation against them in the arbitration system—class arbitration, and to know at the earliest stage in the process whether they will be able to avoid such protraction.

### *B. Procedural Predictability in the Statutory Interpretation Cases*

Although the Court's service of employers' interests in procedural predictability is most evident in the results of the contract cases, the rules of decision that the Court formulated in its statutory interpretation cases also served these interests, albeit in different ways. Beginning with *Vance* and *Nassar*, not only did the employers in those cases prevail in the cases themselves, but they also secured a significant victory in each case for employers in general as repeat players. In *Vance*, the University escaped having to bear a burden of proof as to the *Faragher-Ellerth* affirmative defense against its employee's claim by winning on the issue of defining who is a supervisor for the purposes of the defense.[200] More importantly, though, the University benefitted its own interests as a repeat player in the system of employment dispute resolution, as well as the similar interests of other employers, by securing not only a narrow definition of "supervisor," but also a bright-line, formalistic one.[201]

Recall that both Vance herself and the EEOC favored a fact-intensive, case-by-case approach to who is a supervisor for the purposes of the defense.[202] But the Court essentially reduced the inquiry to the job description: Did the employee in question have the power to hire, fire, reassign, or alter salary or benefits?[203] Going forward, this means that, if an employer pays careful attention to the authority that each employee possesses in relation to other employees, it will know at the earliest stage of every hostile work environment case whether it will have to prove the affirmative defense, or whether it will be able to prevail by simply challenging the plaintiff's proof of the University's negligence in responding to harassment.[204] Such knowledge enhances the predictability of the costs and duration of the suit, and accordingly makes settlement

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[200] Vance v. Ball State Univ., 133 S. Ct. 2434, 2442, 2454 (2013).

[201] *Id.* at 2443–44.

[202] *See supra* notes 99–109 and accompanying text (discussing *Vance*).

[203] *Vance*, 133 S. Ct. at 2443.

[204] In addition, the University and other employers can more easily control their exposure to vicarious liability in hostile work environment suits ex ante by simply adjusting the authority that they grant to their quasi-managerial staff.

determinations much easier, much earlier.[205] It goes without saying that discovery will also be less expensive in such cases if employers no longer have to gather information on the case-specific facts surrounding the relationship between the plaintiff and the alleged harasser.[206]

The Court's reasoning in *Vance* suggests that enhancing procedural predictability for employers was one of the Court's goals.[207] In justifying the adoption of the formalistic, bright-line inquiry for who is a supervisor, Justice Alito reasoned as follows:

> The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases, it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. And once this is known, the parties will be in a position to assess the strength of a case and to explore the possibility of resolving the dispute. Where this does not occur, supervisor status will generally be capable of resolution at summary judgment. By contrast, under the approach advocated by petitioner and the EEOC, supervisor status would very often be murky—as this case well illustrates.[208]

These concerns for procedural predictability trumped functionalist concerns that a person who does not bear the title of supervisor, or who does not have the immediate power to hire, fire, promote, demote, or change salary or benefits, may nevertheless have a significant amount of supervisory authority stopping short of those powers. Such authority might enable—or assist—such an employee in creating an abusive working environment for a co-employee, even absent the threat of an ultimate employment action.[209]

The majority, confronted with these concerns, criticized the functionalist alternative as insufficiently determinative.[210] A particularly good illustration of the majority's hostility to a more open-ended approach is its criticism of the Government's attorney—who argued before the Court in favor of the EEOC's functionalist test—for being unable to specify, ex ante, the percentage of an employee's daily work that would have to be made up of activities directed by a co-employee for that co-employee to be

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[205] *See Vance*, 133 S. Ct. at 2449.
[206] *See id.*
[207] *See id.*
[208] *Id.*
[209] *See id.* at 2459 (Ginsberg, J., dissenting).
[210] *Id.* at 2452–54 (majority opinion).

deemed a supervisor.[211] In essence, then, the majority used a formalist standard—that of procedural predictability—to evaluate the Government's functionalist test, and found it wanting.[212] *Vance* will not protect employers from being sued for hostile work environment harassment under Title VII.[213] But as a result of the *Vance* decision, employers as repeat players have a simple way of determining early in the dispute resolution process whether to settle a hostile work environment suit—simply look at the allegedly harassing employee's job description.

*Nassar* also secured a long-term victory for employers as repeat players, and it grounded its decision on a similar justification based on the desirability of procedural predictability.[214] Recall that, in *Nassar*, the issue was whether the "mixed motive" framework of Title VII's anti-discrimination provisions applies to retaliation claims, and the University employer won the appeal on that issue, meaning that Dr. Nassar would have to prove his retaliation claim using the normal "but for" causation framework.[215] This ruling will have immediate effects in the workplace, as it will now be less risky to discipline or terminate an employee who may have engaged in protected activity while at the same time violating some employer policy that would itself have justified the discipline or termination. But this decreased risk will not, by itself, prevent lawsuits against employers, and plaintiffs will still be able to win such lawsuits where they can prove that, despite the plaintiff's other conduct, the employer would not have taken the challenged action absent a retaliatory motive.[216]

Nevertheless, the rule of *Nassar* serves the interests of employers as repeat players in such litigation because it removes a great deal of uncertainty from the process of a retaliation case at a very early stage in the process. Under the rule of *Nassar*, all employers know from the outset that plaintiffs will have to meet the burden of proving that any justification the employer offers for an allegedly retaliatory employment decision is pretextual.[217] A mixed motive theory allows the plaintiff to concede the legitimacy of the employer's proffered reason and go on to show that retaliation was *also* the employer's motive, forcing the *employer* to then prove that it would have made the same decision even absent the retaliatory

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[211] *Id.* at 2450 ("The Government attorney's inability to provide a definitive answer to this question was the inevitable consequence of the vague standard that the Government asks us to adopt.").

[212] *See id.*

[213] *See id.*

[214] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–33 (2013).

[215] *See supra* notes 110–28 and accompanying text (discussing *Nassar*).

[216] *Nassar*, 133 S. Ct. at 2534.

[217] *Id.*

motive to avoid having to pay damages.[218] But the *Nassar* rule reverses this set of burdens. Under *Nassar*, the employer will escape liability *unless* the *employee* proves that the employer would *not* have made the same decision absent the retaliatory motive.[219] Knowing this at the outset, employers can adjust their discovery plans with an eye toward establishing the legitimate reason for a decision and preventing the plaintiff from proving that it was not the real reason (or even from proving that it was not one reason among several), without having to worry about the employee ever shifting the burden to them.

As it was in *Vance*, this concern for providing employers with procedural predictability was an explicit justification for the Court's decision.[220] In justifying the decision, Justice Kennedy first focused on the recent increases in retaliation claims under Title VII, pointing out that such claims are now second only to race claims in terms of their frequency.[221] Justice Kennedy then posited that a less demanding causation standard would "contribute to the filing of frivolous claims," citing a hypothetical vignette of a bad employee who, knowing that he or she is about to be disciplined, makes "an unfounded charge of racial, sexual, or religious discrimination" to manufacture a retaliation claim.[222]

Justice Kennedy's vignette is somewhat dubious as an argument that such frivolous claims will survive to the later stages of a suit (i.e., past the summary judgment phase), considering the well-established rule that an employer need not forego a planned action against an employee simply because the employee has engaged in protected conduct since the decision to take such action was made.[223] Nevertheless, Justice Kennedy conceded only that the employer in such a situation "could escape judgment after trial," and he expressed concern that employing the motivating factor standard of causation would make it more difficult for the employer to dispose of the case *at summary judgment*.[224] Justice Kennedy further reasoned that "[i]t would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or

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[218] *Id.* at 2526.
[219] *Id.* at 2532–33.
[220] *Id.* at 2531.
[221] *Id.*
[222] *Id.* at 2531–32.
[223] *See* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 272 (2001) ("Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.").
[224] *Nassar*, 133 S. Ct. at 2532.

retaliatory intent."[225] As in *Vance*, therefore, the Court's concern was not that the employers be protected from suit per se, but that suits against them be resolved as quickly and cheaply as possible.[226] These concerns, and the rule that the Court adopted in service of them, sound in procedural predictability—the knowledge, at the earliest stage of the case, of how the case will come out and how much time and money it will take to get to that result.

The Court's other major statutory interpretation case, *Symczyk*, served these same interests in procedural predictability, albeit without employing the explicit justifications found in *Vance* and *Nassar*. Recall that *Symczyk* involved the increasingly common practice of an employer using a formal settlement offer to "pick off" the named plaintiff in a putative collective action under the FLSA before other employees are able to opt into the suit.[227] The Court held only that, once the named plaintiff is "picked off," the collective action becomes moot if no other employee has opted in yet.[228]

The benefits of the "pick-off" strategy are obvious. If the named plaintiffs in collective actions can be picked off one by one before a class can form, an employer can simultaneously accomplish two objectives. First, the employer can prevent a putative collective action from becoming a true collective action, and thereby prevent a small, inexpensive case from becoming a large, expensive one.[229] Second, the employer can prevent the employee class from securing the normal efficiencies and economies of class aggregation, thus making each individual claim more costly, on a per-claim basis, to litigate.[230] As discussed above in the context of class arbitration prohibitions, making each claim more costly to litigate can also have the effect of preventing claims from ever being filed.[231]

In any event, knowing at the outset of a putative collective action that the aggregation of claims can be prevented by picking off the named plaintiff serves the employer's interests in procedural predictability. Moreover, knowing that, even if an Offer of Judgment is not accepted, the same result will be obtained, as long as the Offer is for all of the relief the plaintiff seeks, further serves the employer's interests in predictability.[232] Thus, for employers as repeat players in the employment dispute resolution system, the most desirable outcome for the *Symczyk* case would have been

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[225] *Id.*
[226] *Id.* at 2531–32.
[227] *See supra* notes 129–50 and accompanying text (discussing *Symczyk*).
[228] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013).
[229] *See id.* at 1527, 1532.
[230] *See id.*
[231] *See supra* notes 38–49 and accompanying text (discussing *Italian Colors*).
[232] *Symczyk*, 133 S. Ct. at 1529.

for the Court to endorse the decision of the Third Circuit holding that an unaccepted Offer of Judgment for all of the relief the plaintiff seeks moots the plaintiff's individual claim,[233] which then moots the entire putative collective action. The least desirable outcome would have been for the Court to explicitly reject the Third Circuit's rule on mooting the individual's claim, which would have had the effect of reversing its ruling on mooting the collective action.

The Court took a path between these options that, on balance, favored the interests of employers as repeat players. By assuming the mootness of Symczyk's claim and holding that mooting her claim mooted the putative collective action,[234] the Court preserved the (imperfect, but real) procedural predictability that prevailed under the Third Circuit's opinion, without explicitly endorsing the rule that the individual's claim is mooted through her failure to accept the employer's Offer of Judgment.[235]

As Justice Kagan pointed out in her colorful and humorous dissent, a case with such an important element abandoned or waived is not likely to come before the Court again, so the effect of the Court's decision in establishing a durable principle of mootness is likely to be minimal at best.[236] But in preserving the most important parts of the status quo, and enabling such preservation through the clever use of the Court's "assume without deciding" power,[237] the majority preserved the "pick off" device as a way for employers to manage their litigation exposure at the outset of an FLSA case, at least until the Third Circuit's individual mootness rule comes before the Court properly. By preserving this device, the Court in *Symczyk* preserved the ability of employers to manage the procedural predictability of their own cases.

## IV. CONCLUSION

I have sought through this brief review of the Court's OT 2012 labor and employment-related cases to identify a principle that animated the Court's decisions. That principle is procedural predictability for employers, a principle that, as applied in the OT 2012 cases, assists employers as repeat players in the employment dispute resolution system by allowing them to

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[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *See id.* at 1536–37 (Kagan, J., dissenting) ("The Court could have resolved this case (along with a Circuit split) by correcting the Third Circuit's view that an unaccepted settlement offer mooted Symczyk's individual claim. Instead, the Court chose to address an issue predicated on that misconception, in a way that aids no one, now or ever. I respectfully dissent.") (citation omitted).

[237] *Id.* at 1534.

understand and manage their likely costs in the early stages of an employment dispute.

The general idea of predictability in the law animates any formalist jurisprudence.[238] Chief Justice Roberts's statement at his confirmation hearing comparing judging to umpiring was interpreted by many as staking a claim to formalist judging,[239] and it has generated some interest and commentary as to the Court's formalist tendencies.[240] To date, none of this work has focused on procedural predictability, as I have defined it, as a feature of the Court's ostensible formalism. It would therefore be worth examining the Roberts Court's entire work product in the area of labor and employment, or perhaps in the general area of business litigation, to see whether the procedural form of predictability identified here exerts the normative force in that body of work that it exerted in the Court's OT 2012 labor and employment-related cases.

This Article has begun what will likely be an ongoing inquiry by defining the principle, identifying the ways in which the Court pursued it in the most recent term, and outlining the benefits that it affords employers as repeat players in the employment dispute resolution system.

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[238] *See, e.g.*, Scalia, *supra* note 179.

[239] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts Jr., nominee to be C.J. of the United States).

[240] *See, e.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1199–1200 (2007). In fact, at least one observer has posited that an interest in the formalist concerns for greater predictability and certainty in the law was a driver of some of the Court's business-related decisions in earlier terms. *See* Conrad, *supra* note 178, at 1013–14 (explaining that business victories during the first few years of the Roberts Court's tenure can be explained in part by a desire for predictability in the law). The cases identified by Conrad illustrate concerns for *substantive* predictability—the predictability that the same substantive rules will apply in similar cases, and that liability will not be expanded beyond reasonable limits. *Id.*