Issues for Local Unions Arising Under Federal Employment Statutes: ADA, FMLA, ADEA, & Title VII

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Overview of Topics

1. Family Medical Leave Act (FMLA) of 1993
2. Title VII of the Civil Rights Act of 1964
3. Age Discrimination in Employment Act (ADEA) of 1967
4. Americans with Disabilities Act (ADA) of 1990

Family Medical Leave Act

Family Medical Leave Act

- Cover workplaces with 50 or more employees.
- Protects employees who have worked for the employer for at least 12 months and 1250 hours.
- Provides employees with 12 weeks of leave for employee's own "serious health condition," for the birth/adoption of a child, or to care for a child, spouse, or parent with a serious health condition.

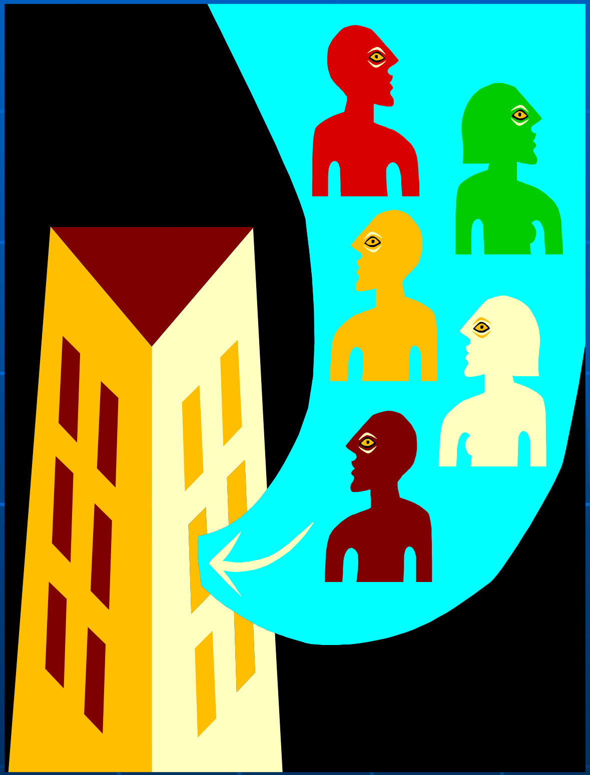
What is a “Serious Health Condition?”

1. Inpatient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health care provider.

2. Condition must necessitate an employee’s absence for more than 3 consecutive days.

3. “An assemblage of diagnoses,” when taken together, can constitute a serious medical condition.

Who is a “Covered Employee?”



- Employee must have worked at least 1250 hours during the 12 months immediately preceding the start of the leave.
- Work hours lost during a grievance, but later awarded by an arbitrator, do not count as hours of service.
- To the extent it purports to extend eligibility to an otherwise ineligible employee who is not immediately notified after requesting leave of his or her eligibility, DOL regulation 29 C.F.R 825.110(d) is invalid.

Who is a "Covered Employer?"

- Employer must employ 50 or more employees for 20 or more weeks in the current or preceding year.
- A union can be an employer under FMLA.
- Individuals may be employers under the FMLA.

Is FMLA Leave Paid or Unpaid?

- FMLA permits employers to provide either paid or unpaid leave.
- Employers are *not* required to provide paid leave.
- Failure to use paid sick leave prior to using FMLA leave does not deprive an employee of FMLA coverage.

Other FMLA Protections

- An employer may not discriminate or retaliate against an employee for exercising FMLA rights.

- An employer is obligated to reinstate an employee returning from FMLA leave, but only if the employee is able to perform the essential functions of his or her job.

- The FMLA requires that the employer allow intermittent leave, but not when the employee is unable to perform the essential functions of his or her job.

- An employee must provide their employer with 30 days notice when leave is foreseeable.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002)

- An employer has a duty to designate leave as FMLA-qualifying leave that will be counted against annual FMLA-leave entitlement.

- However, the Court invalidated the penalty provision of the FMLA regulations, which stated, "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."

The FMLA and CBAs

- The FMLA states that nothing in the Act diminishes an employer's obligations under a CBA.

- An employer may, pursuant to a CBA, provide a more generous leave package to its employees.

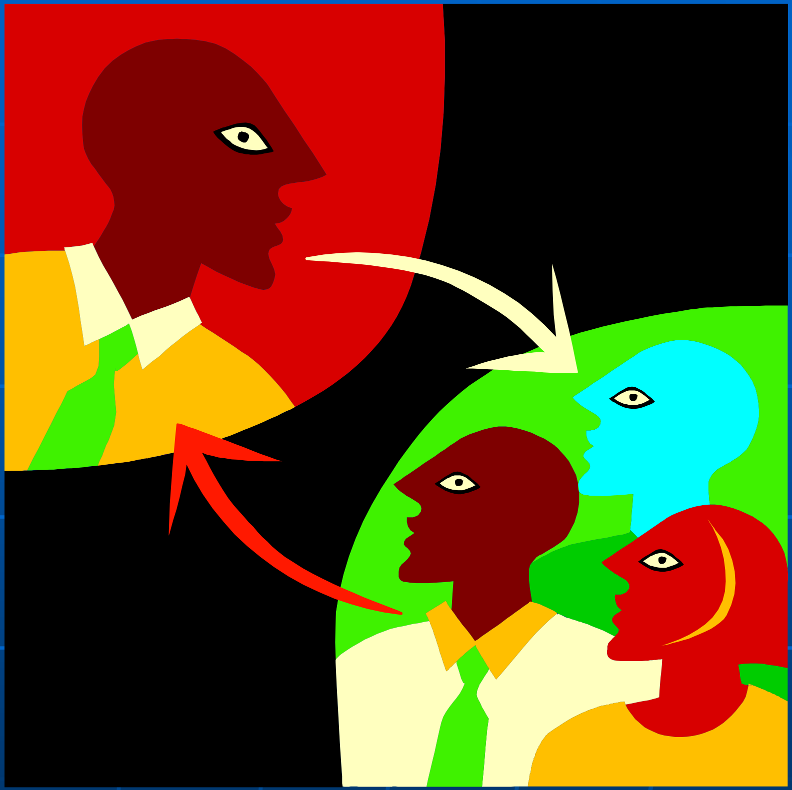
Nevada v. Hibbs, 538 U.S. ___ (2003)

- State employees may recover money damages in federal court if State fails to comply with the FMLA's family-care provision.
- FMLA created to ensure that family-care leave would no longer be stigmatized as an drain on the workplace caused by female employees, and that employers could not evade leave obligations by simply hiring men.

Remaining Questions

- The FMLA does not address the manner in which leave is to be provided when an employee is entitled to both FMLA leave and CBA-provided leave (i.e., do the leaves run consecutively or concurrently).
- Several cases have held that in such a situation, the two leaves must run concurrently.

Title VII of the Civil Rights Act



Title VII of the Civil Rights Act

- Prohibits:
  1. Failing or refusing to hire or discharge a person;
  2. Discriminating against an individual regarding compensation, terms, conditions, or privileges; or
  3. Limiting, segregating, or classifying a employee or job applicant in a way that would adversely affect their status as an employee

when such action is based on that person's race, color, religion, sex, or national origin.

Who is a “Covered Employer?”

- Any employer that employs 15 or more workers.
- An employer includes any agent of a covered employer, but there is no individual liability for supervisory personnel.
- Labor unions are included and prohibited from discrimination.
- “Integrated enterprise” or “single employer” doctrine applies in a Title VII context.

Discrimination by Labor Unions

- International union may be both vicariously and directly liable for a local union's discrimination. Alexander v. Local 496, Laborer's Int'l Union of N. Am., 177 F.3d 394 (6th Cir. 1999).

- Union stewards are employees for purposes of determining whether a union is an employer. Daggitt v. United Food Workers Int'l Union, Local 304A, 245 F.3d 981 (8th Cir. 2001).

Civil Rights Act of 1991

Amendments to the Civil Rights Act of 1964:

1. The plaintiff can establish a prima facie case that an unlawful employment practice exists by showing that the protected characteristic was a "motivating factor for any employment practice."

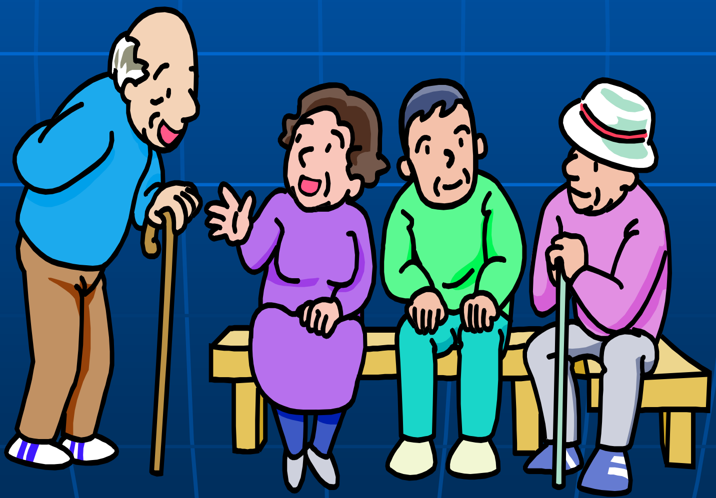
2. The plaintiff may establish an unlawful employment practice by a "disparate impact" theory.

3. The defendant's showing that it "would have taken the same action in the absence of the impermissible motivating factor" is only a partial defense, but may limit the plaintiff's remedies.

Other Provisions of Title VII

- An employer’s intent to discriminate is determined by the agent’s or decision-maker’s state of mind.
- In individual disparate treatment cases, the factfinder’s disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination.
- An employer does not violate the Railway Labor Act by requiring trainee pilots to enter into a pre-hire agreement to arbitrate statutory employment discrimination claims.

Age Discrimination in Employment Act



Age Discrimination in Employment Act

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when such action is based on that person’s age.

Who is a "Covered Employee?"

- Employee must be at least 40 years old to be covered by the ADEA.

- The ADEA does not protect a bona fide executive or high policymaker.

Who is a "Covered Employer?"

- All employers with at least 20 employees.
- Includes any agent of a covered employer.
- Labor unions with at least 25 members are included. If a union's own employment is involved, the union must meet the definition of an employer.
- An employer faces liability under respondeat superior for a supervisor's actions.

Other ADEA Provisions

- An employer may use any reason (even if it is not a "legitimate, nondiscriminatory reason") to rebut the prima facie case as long as it is not the one that the plaintiff is challenging as illegal. Reeves v. Sanferson Plumbing Prods., Inc., 530 U.S. 133 (2000).
- But-for test applies to age discrimination cases. Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994).
- Pension discrimination is not the equivalent of age discrimination. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
- The fact that the plaintiff's replacement is over 40 years of age does not defeat the plaintiff's prima facie case of discrimination. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

Americans with Disabilities Act

Americans With Disabilities Act

- No employer can discriminate against a qualified individual because of that individual's disability if that disability can be reasonably accommodated.

- An employer cannot discriminate when hiring or firing, training, advancing, or compensating employees.

Who is a “Covered Employer?”

- All employers with at least 15 employees.
- Includes any agent of a covered employer.
- Labor unions are included.
- An employer faces liability under respondeat superior for a supervisor’s actions.

What is a “Disability?”

- Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).
  - A disability is a “physical or mental impairment that substantially limits one or more major life activities.” An impairment may be disabling to one individual but not to another.
  - A “major life activity” is an activity of central importance to daily life. (ex., walking, seeing, hearing, or performing manual tasks.)
  - The impairment’s impact must be permanent or long-term.

Who is a “Qualified Individual?”

- Chevron USA, Inc. v. Echazabal, 536 U.S. 73 (2002)
  - A company can refuse to employ a disabled individual if the disability would endanger that individual’s safety in performing their job.

Reasonable Accommodation and Seniority Systems

- US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
  - An employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show that an accommodation is not reasonable.
  - An employee may be able to present special circumstances showing the accommodation is reasonable despite the seniority system.

Disabled employee requests a job change. What happens?

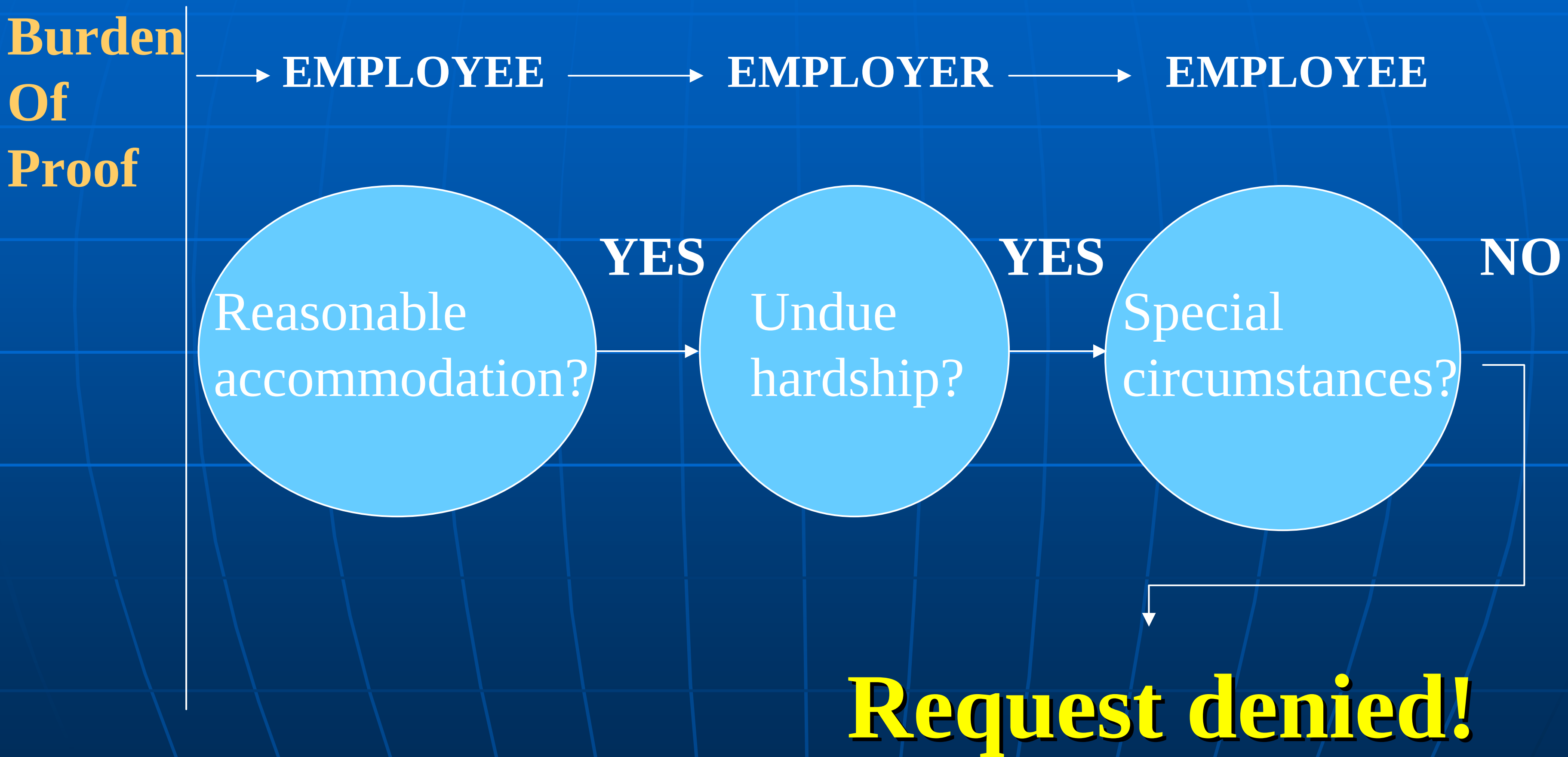
Burden

Of Proof

→ **EMPLOYEE** → **EMPLOYER**

Reasonable accommodation? → **NO** → **Request denied!**

Disabled employee requests a job change. What happens?



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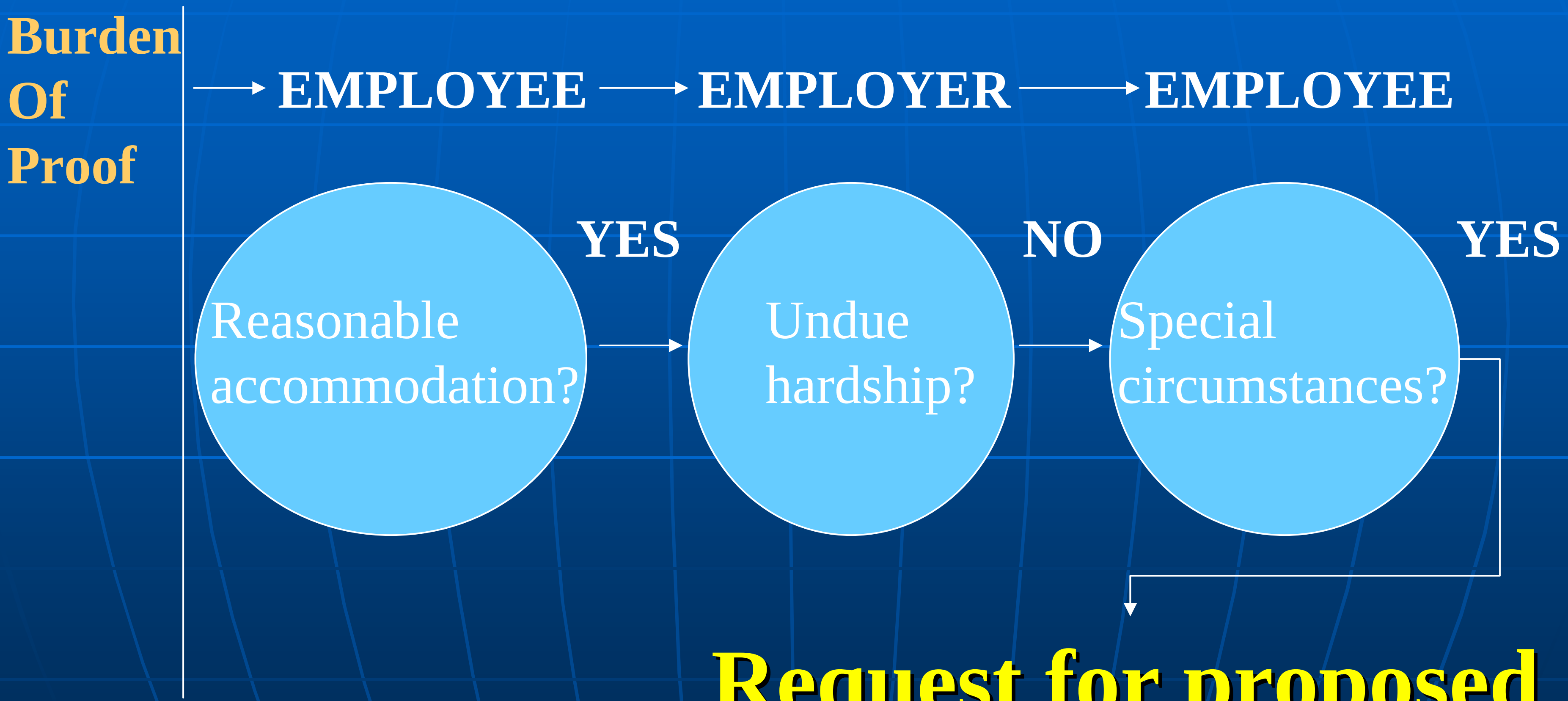


Request for proposed job change granted!

Disabled employee requests a job change. What happens?

Burden Of Proof

→ **EMPLOYEE** → **EMPLOYER** → **EMPLOYEE**

Reasonable accommodation? **YES** → Undue hardship? **YES** → Special circumstances? **YES** →

Request granted!

May Unionized Employers Unilaterally Require Pre-hire Individual Statutory Claim Arbitration Agreements?

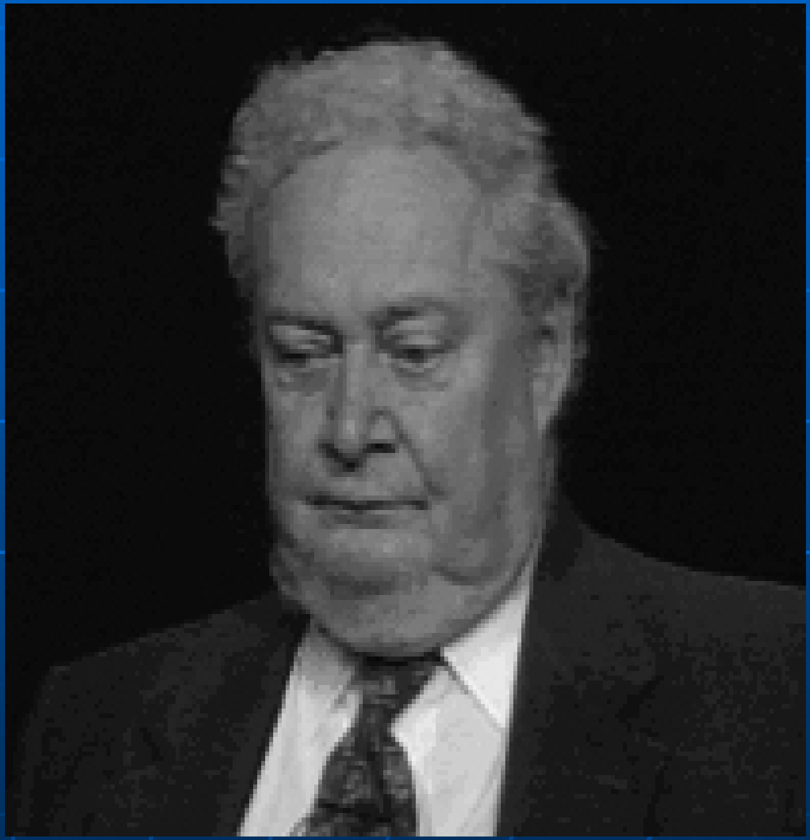
Ronald Reagan

- During his presidency, President Ronald Reagan appointed 3 US Supreme Court Justices: O'Connor, Scalia, and Kennedy.
- Reagan elevated William Rehnquist to Chief Justice of the United States .
- But the Kennedy appointment took a circuitous route, and was perhaps the most contentious in US history.

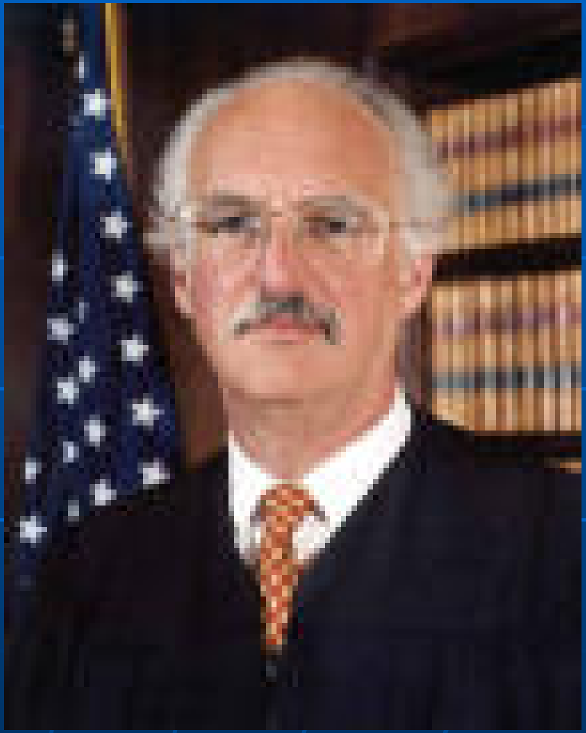
Robert Bork

- Definition:
  - Bork: irreversibly damaged.
  - To bork: to damage beyond repair.

(Urban Dictionary)



Douglas Ginsburg



Anthony Kennedy

- Age: 66 (51 at the time of his appointment).
- Bork 76 (60 at the time of his nomination).
- At least as conservative as Bork.
- Better health (doesn't smoke).

The D.C. Circuit Panel

- Original Panel
  - Judge Douglas Ginsburg
  - Judge Merrick Gardner
  - Judge David Sentelle
- The decision was later adopted by the D.C. Circuit *en banc*.

Prior Case Law

- Alexander v. Gardner-Denver Co., 415 US 36(1974)
  - Court held that arbitration of individual statutory claims was not a mandatory subject of bargaining: a union could not waive a member's right to bring a statutory claim in a judicial form.
- Gilmer v. Interstate/Johnson Lane Corp., 500 US 20 (1991)
  - An employer and its non-union employee could validly subject a claim to a binding arbitration clause in their employment agreement.

ALPA's Arguments

1) The NWA violated the RLA by unilaterally requiring agreement to a condition that is a mandatory subject of bargaining without bargaining with the Union over that condition.

2) Gilmer supercedes Gardner-Denver.

3) Gardner-Denver does not address the subject of arbitrating statutory claims.

4) If waiver isn't a mandatory subject of bargaining, the procedural rules surrounding the arbitration still are.

NWA's Position

- Gardner-Denver prohibits a union from waiving union employees' rights to bring a statutory claim in a judicial forum.
- Because ALPA cannot agree to a mandatory arbitration clause, NWA is free to deal directly with its employees over the arbitration of such claims.

Air Line Pilots Ass'n v. Northwest Airlines: The Facts

- In 1995, Northwest Airlines added a binding arbitration clause to its individual employment contracts.
- Clause required that all discrimination claims arising from the employment relationship be submitted to binding arbitration.
- In 1997, NWA notified ALPA that a probationary pilot was being terminated pursuant to his individual agreement.

ALPA v. NWA: The Holding

- ISSUE: Are binding arbitration clauses mandatory subjects of bargaining under the RLA?
- HOLDING: NO
- Waiver of a judicial forum for resolving statutory claims is not a “mandatory subject of bargaining” under the RLA.
- The employer did not violate the RLA by requiring pilots to enter into a pre-hire agreement to arbitrate statutory employment discrimination claims.

<u>ALPA v. NWA</u>: The Reasoning

- Because, under <u>Gardner</u>, ALPA could not agree to waive a union employee's right to a judicial resolution of his or her claim, such an issue cannot be a mandatory subject of bargaining.

- Because it is not a mandatory subject of bargaining, NWA could deal directly with its employees regarding the arbitration of claims.

<u>ALPA v. NWA</u>: Ultimate Rule of Law

"Unless the Congress has precluded his doing so, an *individual may* prospectively waive his own statutory right to a judicial forum, but his *union may not* prospectively waive that right for him." (emphasis added)

What Result Would Have Been Obtained under the NLRA?

- Significant difference between the RLA and NLRA: who is an employee, and when do they become an employee.

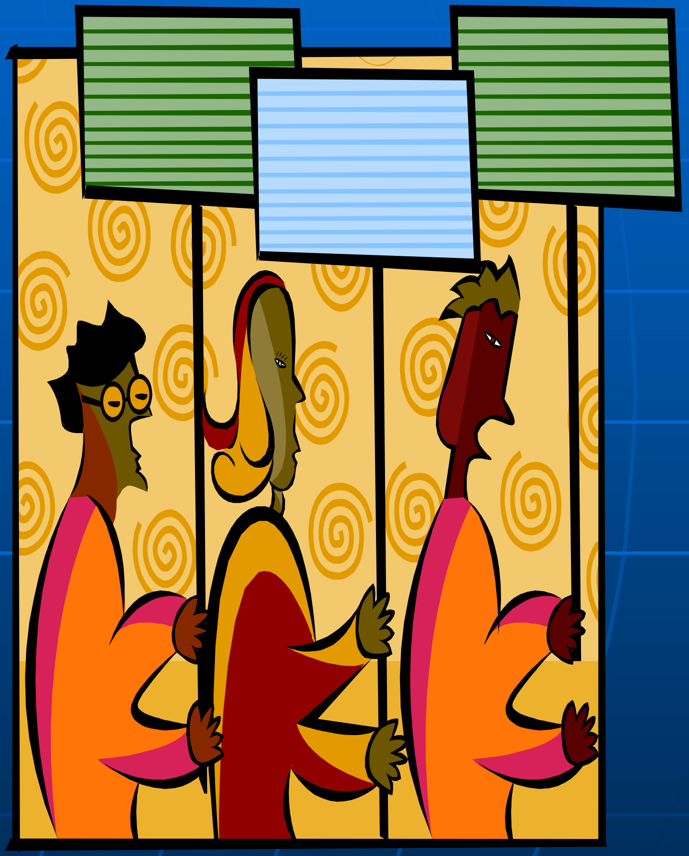
- Still, the logic of ALPA v. NWA applies under the NLRA: the treatment of statutory rights is a matter between the individual and the employer, and is outside the scope of collective bargaining.

ALPA v. NWA: Does the Holding Extend to the NLRA?

- ALPA v. NWA sets a persuasive precedent:
  - There are significant similarities between the RLA and the NLRA, and
  - The D.C. Circuit Court’s decisions are given significant deference because the court has expertise in labor matters.
- But, to date, no other circuit court has followed the precise holding of the case. (Although several district courts have cited it as authority.)

Criticism of ALPA v. NWA

- Pre-dispute arbitration agreements are given more force if they are entered into by employees individually, than if they are negotiated by powerful unions acting on the employees' behalf.
- Extremely narrow view of what was really at issue.



Supreme Court Guidance

- The employer and union must bargain in good faith about “wages, hours, and other terms and conditions of employment.”
- An employer cannot unilaterally change conditions of employment.
- Problem: Are pre-dispute arbitration clauses a term or condition of employment?

Mandatory Subjects of Bargaining

- Issues such as eliminating discrimination are mandatory subjects of bargaining under the NLRA.
- Drug testing of the employer's current employees.
- A CBA's grievance procedure, and arbitration provisions, including the arbitration process.

Arbitration Clauses: Permissive or Illegal Subjects of Bargaining?

- The NLRB has held that a general release of claims for any employment cause of action is not a mandatory subject of bargaining.

- Prior Supreme Court and NLRB cases can only be reconciled with <u>ALPA v. NWA</u>, if <u>ALPA</u> is limited to prospective employees, or if it is modified so that waivers are *permissive* subjects of bargaining.

Implications of ALPA v. NWA

- Does ALPA preclude unions from any participation in an employer-employee discussion of arbitration clauses?

- The D.C. Circuit assumed that a union would be eager to waive statutory rights collectively, but such a waiver may not be in the union's best interests.

Scenarios

- Assume a pilot says "I'm rescinding my waiver." What can the employer do?

  1) The employer could discharge the employee;

  2) The employer could try to enforce the agreement through injunctive or declaratory relief;

  3) The employer could enforce the agreement when, and if, the employee sues; or

  4) The employer could do nothing.

Scenarios, continued

- What can the union do if the employer discharges the employee?
- Respond that there is no just cause to discharge;
- "Rescission" of agreement is a future threat;
- Might never occur (may never have a claim, or not object to arbitration);
- Or, negotiate rescission of all such waivers.
- Advice for the employer:
  - Wait and see; if sued, plead waiver as a defense.

Final Thoughts: A Flawed Decision

- The issue presented in ALPA v. NWA was not whether statutory discrimination claims are a mandatory subject of bargaining.
- The Real Question: Should employers be required to bargain collectively over such claims as they are required to bargain over other subjects?
- Remember, the U.S. Supreme Court hasn't decided the issue!