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DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW IN THE UNITED STATES

(SEPTEMBER 2018 - JANUARY 2019)

I - UNITED STATES SUPREME COURT

In *New Prime, Inc. v. Oliveira*¹, the U.S. Supreme Court held that an employer trucking company could not compel its drivers to arbitrate their wage claims, rather than litigating the claims in court. This case is an unusual win for workers, given the long line of Supreme Court precedents since 2001 that have established that mandatory agreements to arbitrate employment-related disputes are enforceable in non-union workplaces². Under such agreements, as a condition of employment, employees waive their rights to seek redress for legal claims through the courts. The Supreme Court has found such arbitration agreements to be enforceable under the Federal Arbitration Act (FAA)³, which was enacted by Congress in 1925. Moreover, the Court has held that the FAA's exemption of contracts of employment for workers in interstate commerce applies only to transportation workers. Based on this exemption, the Court held in *New Prime* that the employer trucking company could not compel the drivers arbitrate their claims that the trucking company had failed to pay them the minimum wage. Further, the Court held that the FAA exemption applied to workers in a traditional employer-employee relationship, as well as to workers who were hired as independent contractors.

II - NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) currently has four of five seats filled. Three of these seats are filled with conservative appointees nominated by President Trump and confirmed by a conservative U.S. Senate. Only one of the members is a more liberal appointee who had been nominated by President Obama.

In two recent cases, in 3-1 votes, the NLRB overruled precedents decided by the Board under the Obama administration. In *Alstate Maintenance, LLC*⁴, the Board held that an employee who was discharged for complaining about poor tipping by a customer was not protected by employee rights under the National Labor Relations Act (NLRA) to engage in «concerted activities for the purpose of mutual aid or protection». The employee was a skycap, whose job was to assist arriving airline passengers with their luggage at the airport

1 139 S.Ct. 532 (2019).

2 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

3 29 U.S.C. §1 et seq.

4 367 NLRB no. 68 (2019).

terminal. The bulk of skycaps' compensation comes from passengers' tips. The employer's discharge letter noted that the employee had raised the tipping concern in front of the other skycaps. The Board majority held that the employee was not engaged in concerted activity because his statement did not constitute an attempt to initiate any group action nor was it a group complaint, but was «more than likely mere griping»⁵. In overruling the precedent in *WorldMark by Wyndha*⁶, the Board held that individual employee statements or complaints «made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity»⁷. The Board held, further, that the employee's complaint was not made for the purpose of mutual aid or protection. Rather, the Board found that passengers' tips were not related to skycaps' terms and conditions of employment because they are not wages received by the employees. Dissenting member McFerran criticizes the Board majority for «impos[ing] arbitrary restrictions on what constitutes concerted activity, ignoring workplace realities and the wide range of means by which employees might protest unfair conditions»⁸. Given the low union density in the U.S., such protection is especially important to enable employees in non-union workplaces to exercise their rights to raise complaints about their working conditions. The dissent further castigates the majority for holding that customer tips are not a term or condition of employment, which «will come as a great surprise to the millions of tipped workers who depend on tips for most of their pay»⁹.

In *SuperShuttle DFW, Inc.*¹⁰, the NLRB created a new test for determining whether workers are independent contractors excluded from protection of the NLRA. The Board overruled the decision in *FedEx Home Delivery*¹¹, finding that it «impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis». The common-law test, which has been used for many years by the NLRB, including in the FedEx case, examines multiple factors to determine independent contractor status, including the extent of control exercised by the employer, the skilled required in the particular occupation, and whether the work is part of the employer's regular business. The Board in *SuperShuttle*, however, concluded that the FedEx decision had wrongly emphasized the «economic realities» of the relationship between an employer and the worker and in so doing, had undervalued the importance of «entrepreneurial opportunity»¹². As dissenting member McFerran notes, however, there is no support for the Board majority's position in *SuperShuttle*, which «rests on the premise that entrepreneurial opportunity' is the core concept of the traditional common-law agency test»¹³.

5 *Ibid.*, p. 16.

6 356 NLRB 765 (2011).

7 367 NLRB no. 68, at 31.

8 *Ibid.*, p. 76-77.

9 *Ibid.*, p. 77.

10 367 NLRB no. 75 (2019).

11 361 NLRB no. 610 (2014), *enf. denied*, 849 F.3d 1123 (D.C. Cir. 2017).

12 367 NLRB no. 75, p. 7 and no. 14.

13 *Ibid.*, p. 21.