Revue de droit comparé du travail et de la sécurité sociale

4 | 2020
English Electronic Edition

Developments in Labor and Employment Law In the United States

Risa L. Lieberwitz

Electronic version

URL: <https://journals.openedition.org/rdctss/909>

DOI: 10.4000/rdctss.909

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2020

Number of pages: 176-179

ISSN: 2117-4350

Electronic reference

Risa L. Lieberwitz, "Developments in Labor and Employment Law In the United States", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2020, Online since 01 December 2020, connection on 25 January 2022. URL: <http://journals.openedition.org/rdctss/909> ; DOI: <https://doi.org/10.4000/rdctss.909>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

RISA L. LIEBERWITZ

CORNELL UNIVERSITY, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS

DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW IN THE UNITED STATES

I - UNITED STATES SUPREME COURT

In a landmark ruling in June 2020, *Bostock v. Clayton County, Georgia. v. EEOC*¹, the US Supreme Court held that sex discrimination prohibited by Title VII of the Civil Rights Act of 1964² includes discrimination based on sexual orientation and gender identity. Title VII, which applies to public and private employers, prohibits employment discrimination on the basis of race, color, sex, national origin and religion. The Court's 6-3 decision arose from three consolidated cases from different federal appeals courts, which had reached conflicting outcomes in interpreting Title VII. It is notable that two of the conservative Justices joined the majority, with one of them being Justice Gorsuch, who wrote the majority opinion. Taking a « textualist » approach, the Court concluded, « An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids »³.

On June 18, 2020, the Court ruled that the Trump administration acted improperly in terminating the Deferred Action on Childhood Arrivals (DACA) without sufficient justification⁴. DACA, which was created by the Obama administration in 2012, shields from deportation approximately 700,000 young, undocumented immigrants who came to the US as children, and who qualify to work legally in the United States, pursue higher education, and gain access to other benefits, such as health insurance and driver's licenses⁵. In a 5-4 decision written by Chief Justice Roberts, the Court found that the Trump administration acted « arbitrarily and capriciously » by failing to justify its view that the forbearance of deportation was illegal, and failing to consider the hardship to DACA recipients who had relied on the program⁶. The Court remanded the case to the federal Department of Homeland Security (DHS) to reconsider the issues.

Upon remand, the DHS imposed interim guidance restricting the scope of DACA⁷. Legal challenges to this new guidance have been filed⁸.

In *Our Lady of Guadalupe School v. Morrissey-Berru*⁹, the US Supreme Court clarified the scope and applicability of the « ministerial exception » previously recognized by the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*¹⁰. In *Hosanna-Tabor*, the Court held that employees who fall within a « ministerial exception » are precluded from bringing anti-discrimination law claims against their religious institution employers. Although religious institutions are generally covered by employment discrimination laws, the Court held that they are constitutionally protected from governmental interference with their employment relationship with its « ministerial » employees. In *Our Lady of Guadalupe*, the Court, in a 7-2 decision, made clear that the « ministerial exception » broadly favors the religious institution. In *Hosanna-Tabor*, the Court declined « to adopt a rigid formula for deciding when an employee qualifies as a minister » but identified four relevant factors to consider. In *Our Lady of Guadalupe*, however, the Court emphasized the importance of only one of the factors, whether the individual's « job duties reflected a role in conveying the Church's message and carrying out its mission »¹¹. Any other circumstances, such as the individual's title or the extent of their religious training, will be considered only as they shed light on that broader factor¹². The Court applied this approach to conclude that the two plaintiffs, who were Catholic elementary school teachers responsible for providing instruction in all subjects, including religion, fell within the ministerial exception. The teachers had signed employment agreements that expressly stated that their role was to promote the religious mission of the school and received employee handbooks that stated the same¹³. These teachers, therefore, were not eligible to bring their claims alleging employment discrimination based on age and disability.

II - NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB or Board) currently has four of five seats filled, made up of three conservatives and one liberal member. The three-member Board majority has continued its pattern of narrowing employee rights under NLRA, either by overruling or narrowing Board precedents. In June 2020, the NLRB issued a decision on coverage of religiously-affiliated institutions under the National Labor Relations Act (NLRA)¹⁴. In *Bethany College*¹⁵, the Board adopted a legal test that will exempt virtually all religiously-affiliated colleges or universities from the jurisdiction of the NLRB. The Board will not exercise jurisdiction over any nonprofit educational institution that holds itself

7 American Immigration Lawyers Association (Aug. 26, 2002): <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/aila-practice-alert-filing-daca-renewal>

8 Washington State Office of the Attorney General, AG Ferguson updates DACA lawsuit after Trump Administration again strips protections for Dreamers (Aug. 28, 2020): <https://www.atg.wa.gov/news/news-releases/ag-ferguson-updates-daca-lawsuit-after-trump-administration-again-strips>

9 ___ U.S. ___, 140 S. Ct. 2049 (2020).

10 565 U.S. 171 (2012).

11 140 S. Ct. At 2062-63.

12 *Ibid.* at 2063.

13 *Ibid.* at 2066.

14 29 U.S.C. §151 et seq.

15 369 NLRB no. 98 (2020) (slip opinion).

out as providing a religious educational environment and that is affiliated with, or owned, operated, or controlled by a recognized religious organization¹⁶. Agreeing with the federal appeals court that created this legal test, the Board justified its hands off approach as a means of avoiding the constitutional prohibition on governmental entanglement with religion¹⁷. As a consequence of this decision, however, faculty teaching secular subjects in colleges or universities will have no rights to unionize or collectively bargain under the NLRA. In adopting this test, the Board overruled the legal test from its 2014 decision in *Pacific Lutheran University*¹⁸, declining jurisdiction only where the college or university holds out the faculty members as performing a specific role in creating or maintaining school's religious educational environment¹⁹.

The Board has continued to expand employer power to restrict the scope of employees' speech related to workplace issues. Section 7 of the NLRA protects employee concerted activity related to the workplace²⁰, which includes employee discussions, heated debates, and sharp criticisms of their employers. In July 2020, in *General Motors, LLC*²¹, the conservative three-member majority of the Board held that it will analyze employer discipline or discharge of employees for « abusive » speech under the legal test for discrimination cases²². The General Counsel must prove a *prima facie* case that the employer's discipline was motivated by animus against the employee's Section 7 activity. The employer must then prove that it would have taken the same action even in the absence of the Section 7 activity. This test of causality will be used in a broad range of cases, including employee concerted activity at the workplace, on social media, and during strikes²³. The Board's *General Motors* decision overrules long-standing precedents that had defined protected Section 7 activity more broadly to include emotionally charged or even offensive speech or « outbursts » that are often part of workplace-related discussions, debates, or other collective action²⁴. The Board justifies its new rule as necessary to enable employers to address workplace harassment that is prohibit under antidiscrimination laws²⁵. However, former NLRB Chairman Mark Pearce has noted that the Board's decision in *General Motors* may permit employers to discipline employees for relevantly « injecting [issues of] race into the scenario »²⁶. As Pearce states, « In the wake of the protests of George Floyd's killing, the Board is now instilling an attitude that if you want to keep your job you

16 369 NLRB no. 98 (slip opinion), at 3.

17 *Ibid.* at 20-21.

18 361 N.L.R.B. 1404 (2014).

19 *Ibid.*

20 29 U.S.C. §157.

21 369 NLRB no. 127 (slip opinion).

22 *Ibid.* at 5.

23 *Ibid.* at 1-5.

24 *Ibid.* at 2-4.

25 *Ibid.* at 26-27.

26 Hassan A. Kanu, « NLRB's GM Ruling Gives Employers More Slack to Punish Speech (1) », *Bloomberg Law* (July 21, 2020), at 2.

better be subservient, because you could lose your job if you engage in vocal protests of abysmal working conditions »²⁷.

III - EMPLOYEE RIGHTS DURING THE COVID-19 PANDEMIC

Given the weak welfare state in the US, government action has been crucial to provide emergency relief through unemployment compensation and paid leave to the millions of individuals laid off or facing possible layoffs during the Covid-19 pandemic. Although Congress enacted emergency legislation providing for such benefits, such governmental assistance has been limited by the temporary duration of the funding, which expired in July 2020, and by exempting multiple types of businesses from paid leave requirements, such as exemptions for businesses with 500 or more employees²⁸. Due to the current political stalemate between the Democrats and Republicans in Washington, new benefits legislation has not yet been enacted. Workplace health and safety has also been of great concern, with the federal Occupational Health and Safety Administration (OSHA) coming under strong criticism for its failure to adopt enforceable safety rules to address working conditions related the pandemic²⁹. Further, OSHA has issued only meager fines against large meatpacking companies for safety violations that resulted in the deaths of essential workers during the pandemic³⁰.

---

27 *Ibid.*

28 Jeanna Smialek and Jim Tankersley, « Economic Data Points to Pause in Recovery as Aid Programs Expire », *New York Times* (Aug. 21, 2020).

29 Editorial Board, « Under Trump, OSHA's Covid-19 Response Is Failing Workers », *New York Times* (Sept. 14, 2020).

30 *Ibid.*