Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

August 2020 Volume 20, Issue 8

SUPREME COURT UPHOLDS RELIGIOUS PROTECTIONS IN EMPLOYMENT AND GOVERNMENTAL REGULATIONS

Edward H. Trent

"[T]he the effect these cases may have on other religious objections to expanding governmental regulation of the workplace raises interesting questions..."

On July 8, 2020, the United States Supreme Court issued two 7-2 opinions in cases upholding various religious concerns in the areas of employment. The first concerned whether a teacher terminated from a church school could sue for employment discrimination. The second should bring to an end a seven-year odyssey for a group of Catholic religious sisters and their challenge to the Patient Protection and Affordable Care Act's "contraception mandate." While the cases specifically concern religious employers and the expanded religious-based exemption to the "contraception mandate," the effect these cases may have on other religious objections to expanding governmental regulation of the workplace raises interesting questions when federal law conflicts with religious free exercise.

A. *Our Lady of Guadalupe School v. Morrissey-Berru, Case No. 19-267, decided July 8, 2020*

The Court reversed the decision of the Ninth Circuit Court of Appeals in two cases involving elementary school teachers in Catholic schools in the Archdiocese of Los Angeles. Both teachers claimed that they were improperly terminated or did not have their contract renewed, for reasons that violated the Age Discrimination in Employment Act and the Americans with Disabilities Act. In a 7-2 decision, the Court held that the "ministerial exception" applied to both teachers, reaffirming and expanding on its previous 9-0 2012 decision in *Hossana-Tabor*. As a result, neither teacher could maintain a claim against the church school.

Both teachers were responsible for teaching religion, leading students in prayer, and participating with students at Mass, even though the majority of their time was spent teaching "secular" subjects such as math, reading, science, and history. While both were lay teachers and not formal "ministers" as may have applied to the plaintiff in *Hosanna-Tabor*, the role of the teacher in the Catholic elementary school was integral to the Church's mission of passing on the faith. The Court rejected a rigid approach to determining whether someone qualifies as a "minister" in a particular faith community or organization. The Court also rejected the notion that the individual had to be a member of the religious faith community of the employer to qualify as a "minister" for purposes of the "ministerial exception." As the Court concluded: "When a school with a religious mission entrusts a teacher with the responsibilities of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." p. 26-27.

B. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et. al*, Case No. 19-431, decided July 8, 2020

In *Little Sisters of the Poor*, the Supreme Court again dealt with religious objections to the "contraception mandate" of the Affordable Care Act (ACA). The "mandate" is a product of regulations issued under the Preventative Care Guidelines by the Health Resources and Services Administration (HRSA) that required making available all Food and Drug Administration approved contraception methods as part of preventative health care. It was this requirement, not found in the text of the statute but in the administrative regulations, that had been challenged by numerous religious organizations falling outside the

Continued on page 2

narrow "church exemption" and by private companies with religious objections to some or all forms of contraception coverage.

At issue for the Supreme Court this time were new regulations issued by the Departments of Health and Human Services, Labor, and Treasury based on HRSA's updated Preventative Care Guidelines, expanding exemptions to the contraception mandate due to religious objections. In attempting to address various religious objections from both religious entities and privately held corporations to the mandatory provision of various forms of contraception, the Departments and HRSA revisited the prior regulations and Guidelines. These efforts were spurred on by the Court's decisions in *Burwell v. Hobby Lobby* (holding that the contraception mandate violated the religious freedoms of a privately held company under the standards codified in the Religious Freedom Restoration Act (RFRA)) and in *Zubik v. Burwell* (where the court remanded challenges to the self-certification accommodation in the regulations for religious entities, doing so without deciding the RFRA question in that case).

The Departments sought input from the public and various stakeholders and found it challenging to formulate minor changes to the regulations that would satisfy the religious liberty interests of the various employers directly affected by the regulations. Ultimately, the Departments promulgated two Interim Final Rules (IRFs) expanding the limited "church exemption" to any employer that "objects [to the provision of contraception coverage – including through the self-certification process] based on its sincerely held religious belief," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraception services." The second IFR applied to those who had similar objections based on moral grounds. After public input, the IFRs became final with little change to the original IFR.

Pennsylvania and later New Jersey sued to challenge the regulations. The states particular interest is not discussed in the ruling, but the challenge was twofold: (1) the Departments lacked the authority to create the religious and moral based objections to providing contraception coverage as part of the employer's health care plan, and (2) the Departments failed to comply with the procedural requirements of the Administrative Procedures Act. The Supreme Court rejected both arguments, thus reversing the two lower courts that had stuck down the new regulations.

The Little Sisters of the Poor are a consecrated Catholic religious order of women who provide care to the elderly poor. They care for people regardless of their faith tradition and do so out of a religious obligation and desire to care for those in need. As a Catholic religious order, the Little Sisters maintain that all forms of contraception are contrary to God's plan for the human person. Even self-certifying their objections - which would lead to their insurance company directly providing the objectionable contraception coverage to lay employees of their elderly homes - would be in violation of their religious beliefs. The new regulations would alleviate their objections by excluding the Little Sisters from the mandate.

The Supreme Court noted that the ACA provided a clear basis for the Departments and the HRSA to provide for exemptions based on religious beliefs. The Court noted as much when deciding *Hobby Lobby* and finding that the religious exemptions were too narrow (making the mandate a substantial burden on employers not covered under the far more limited church exemption in the original regulations). The Court also directed the Departments to consider the impact of religious objections under RFRA when it remanded the *Zubiak* case in 2016. Accordingly, the Court held that the regulations were clearly within the authority granted to the Departments under the statute.

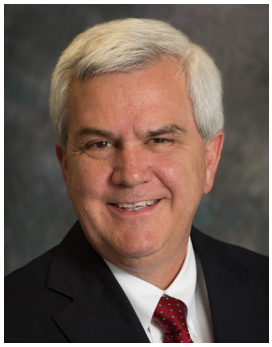
The second issue concerned the procedural requirements of the Administrative Procedures Act. Here again the Court found that the notice of rules was given even though it was done under an Interim Final Rule rather than a Notice of Rulemaking. The Departments accepted public comment and justified their actions. Nothing more in this case was required, given the explicit grant of discretion to the Departments in the statute.

One question remained potentially unanswered as addressed by Justice Alito in his concurring opinion, namely whether the Department, in spite of having authority to issue the regulations and having complied with the APA's procedural requirements, acted in an arbitrary and capricious fashion in establishing the regulations. While the majority opinion, which Justice Alito joined, held that the Departments consideration of RFRA was clearly not arbitrary and capricious (even suggesting that failing to consider RFRA would have been arbitrary and capricious), the Court did not explicitly hold that the new regulations were required by RFRA. Justices Alito and Gorsuch would have so held.

Justice Alito's concerns find further voice in Justice Kagan's concurring opinion which is joined by Justice Breyer. In her opinion, Justice Kagan agrees that the Departments have the authority to issue the regulations at issue. She questions, however, whether "the exemptions can survive administrative law's demand for reasoned decision making," noting that this "reasoned decision making" question remains open on remand. The dissent authored by Justice Ginsburg and joined by Justice Sotomayor believed that the Departments lacked the authority to grant any exemptions to the provisions of

Continued on page 4

NLRB REVISES STANDARD FOR ANALYZING CLAIMS OF UNLAWFUL DISCIPLINE WHEN AN EMPLOYEE WHO IS ENGAGED IN PROTECTED CONDUCT ALSO ENGAGES IN ABUSIVE CONDUCT



Howard B. Jackson

"Bottom line, this case is good for employers and for the fair administration of the National Labor Relations Act."

The National Labor Relations Board ("NLRB" or "Board") has for years analyzed a variety of circumstances where an employee who was engaged in a form of protected conduct under Section 7 of the National Labor Relations Act (the "Act") also engages in some form of abusive conduct. Examples are discussed below. Please note at the outset that an employee who engaged in abusive conduct such as profanity-laced tirades or racially or sexually charged remarks unconnected to any protected activity is clearly subject to corrective action on the same terms as others. Of course, applying discipline to union employees and not to others, or applying harsher discipline against union employees, would invite charges of unlawful discipline under the Act.

In the *General Motors* decision issued July 21, 2002, the Board overturned earlier precedent and established a unified standard for analyzing claims that the employer unlawfully disciplined an employee who engaged in abusive conduct at the same time he or she was engaged in protected activity. In connection with justifying its decision to overrule previous decisions the Board noted that the existing "setting-specific" standards presented multiple concerns.

There were three primary settings. One involves an outburst toward management. Another involves social media posts and most employee-to-employee interactions. The third is picket line conduct.

In the outburst cases the Board had applied a four-factor test from *Atlantic Steel*. The factors were: (1) the place of the discussion; (2) subject matter of discussion; (3) nature of the outburst; and (4) whether the outburst was to any extent provoked by an unfair labor practice.

In social media and employee-to-employee cases the Board used a totality of the circumstances test. For picket line conduct matters the question was whether under the circumstances non-strikers would have been reasonably coerced or intimidated by the abusive conduct.

The Board noted that use of these standards had produced inconsistent results, which of course reduced predictability. The Board expressed particular concern that violations found under the existing standards had "conflicted alarmingly with employers' obligations under federal, state, and local nondiscrimination laws." This comment alludes to multiple decisions wherein the Board found discipline or discharge unlawful under the Act even though the employees in question made blatantly racist and/or sexist remarks in the course of their Section 7 activities.

Rather than continue the "setting-specific" standards the Board ruled that it would apply the *Wright Line* standard to cases where an employer is alleged to have unlawfully disciplined an employee who was engaged in Section 7 activity and the employer responds that the reason was the employee's abusive conduct. The *Wright Line* analysis has been used by the Board for decades to analyze claims of discriminatory discipline or discharge. It makes sense to follow that standard in these cases as well.

Under *Wright Line*, the General Counsel (which is the prosecutorial arm of the Board), must prove: (1) the employed engaged in conduct protected by the Act; (2) the employer knew of the conduct; and (3) the employer had animus against the Section 7 activity. The proof of animus must be "sufficient to establish a causal relationship between the discipline and the Section 7 activity."

If the General Counsel makes the required initial showing, the burden of persuasion shifts to the employer to show that it would have taken the same action in the absence of the Section 7 activity. Requiring the burden of persuasion is another way of saying that the employer must prove it would have taken the same action.

Notably the Board applied this standard retroactively to all cases pending before the Board at this time. Accordingly, an employer who has a charge or case of this nature pending may wish to present additional facts and evidence which are now relevant under the newly established standard.

Bottom line, this case is good for employers and for the fair administration of the Act. It establishes a uniform and, for labor practitioners a familiar, analytical framework for cases that involve both protected and abusive conduct. It should lead to greater comfort for employers when they impose disciplinary action for genuinely abusive conduct.

contraceptions and believed there is no rational basis for the exemptions. If the States of Pennsylvania and New Jersey choose to continue their challenge to the regulations, organizations such as the Little Sisters of the Poor will again face uncertainty on this question. While the majority opinion hints that the regulations clearly meet the "reasoned decision making" criteria by providing for the very religious exceptions the Court held were required in *Hobby Lobby*, this legal saga may continue and if it does, employers with religious objections to providing some or all contraception methods will remain in limbo.

C. Final Note

In its opinion, the majority noted that the ACA was not exempted from the reach of RFRA, noting that Congress could exempt certain statutes from RFRA. For example, in the version of the "Equality Act" passed by the House of Representatives to specifically expand all civil rights statutes to define "discrimination because of sex" to "discrimination because of sex (including sexual orientation and gender identity)" the legislation contains specific provisions that RFRA would not apply to the statutes in question. Even in light of the Supreme Court's recent decision in *Bostock v. Clayton County, GA*, the debate between religious freedom and individual prerogative on various questions will continue and the role the Religious Freedom Restoration Act will play in those debates will continue. Nevertheless, the Court has signaled that at least when it comes to federal statutory law and regulations, Congress has the ability to exempt certain statutes and regulations from RFRA's reach, an action that may force the Court to revisit its 1990 holding in *Employment Division v. Smith* that holds that the burden on religious free exercise by laws of general applicability does not create a constitutional violation. RFRA was passed with overwhelming support by both parties to address and reverse this decision. If Congress now chooses to exempt certain statutes that have a clear overlap on religious free exercise and belief, the protections of the First Amendment will be greatly diminished, not just for churches, which enjoy special First Amendment protections as noted above, but for individuals, both as employees and business owners. As Justice Ginsburg noted again in her dissent in *Little Sisters of the Poor*, "*Smith* forecloses '[a]ny First Amendment Free Exercise Clause claim [one] might assert' in opposition to [the contraception or any other generally applicable federal] requirement."

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

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