Labor & Employment Issues
In Focus

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"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."

Abraham Lincoln

GRAPES OF WRATH?
SCOTUS TO REVIEW UNION ACCESS TO FARM WORKERS

On November 13, 2020, the United States Supreme Court agreed to review a Ninth Circuit decision concerning labor organizing rights for agricultural workers. *Cedar Point Nursery v. Hassid*, No. 20-107 (U.S. Aug. 3, 2020). The forthcoming decision, and especially any Court ruminations on employer property rights, could have serious implications for labor organizing down the road in all industries.

In *Cedar Point Nursery v. Shiroma*, the Ninth Circuit considered the constitutionality of a 1975 California agricultural labor board regulation permitting union organizer access to an employer's property. No. 16-16321 (9th Cir. May 8, 2019). The regulation was a major achievement of the United Farm Workers and César Chávez. The regulation recognizes that unions seeking to organize agricultural employees generally do not have alternative channels of effective communication available in other industries. The regulation provides organizers with a limited right of access, requiring employers to make their property available for 120 days per calendar year for a petitioning union. The regulation permits organizers to enter the property for up to three hours per day – an hour before work, after work, and during the lunch period. Despite the California Supreme Court upholding the regulation in 1976, two employers pursued the underlying claim in 2016, alleging that the regulation amounts to a taking in violation of the Fifth Amendment and effects an unlawful seizure of property in violation of the Fourth Amendment.

The Ninth Circuit, in a split panel decision, rejected the employers' constitutional claims based on Supreme Court analogous precedent. The Court noted that the Fifth Amendment Takings Clause prohibits the taking of private property for public use without just compensation. Among other circumstances, the Supreme Court finds a violation where "the government requires an owner to suffer a permanent physical invasion of her property-however minor," notably concluding in *Loretto v. Teleprompter Manhattan* that a state law requiring landlords to allow installation of cable television equipment constituted a taking. In contrast, the Supreme Court held in *PruneYard Shopping Center v. Robins* that a state grant to the public of a right to free speech at a privately owned shopping center did not constitute a taking. The *Cedar Point* employers conceded that the union access regulation did not produce a continuous taking, like in *Loretto*, due

to the temporal restrictions on the organizing access. Instead, they argued that the permanence requirement of the Takings Clause was met because of the lack of a contemplated end-date for the property invasion. The Ninth Circuit rejected this argument, noting that no end-date was contemplated in *PruneYard*. The Court also suggested that the government's restriction solely on an owner's right to exclude is not a sufficient invasion of property rights to constitute a taking. Finally, the Court rejected the employers' Fourth Amendment claim, holding that the access regulation did not meaningfully interfere with their property interests under Supreme Court caselaw.

Republican appointee Judge Edward Leavy dissented, distinguishing *PruneYard* as a free speech case involving property that was open to the public at large. Judge Leavy contended that this case should be guided by National Labor Relations Act precedent requiring property access only when employees are beyond the reach of reasonable union efforts to communicate. Eight Republican-appointed Ninth Circuit judges dissented from denial of *en banc* review, arguing that the California regulation appropriated an easement and thus constituted a taking. The dissenters also attacked the continuing viability of the rationale for the access regulation, contending that modern technology gives organizers more ways of contacting employees.

The Supreme Court could presumably decide this case in a number of ways. The Court, given its conservative bent, might seek to restrict state-granted access rights for public sector unions in either a narrow or broad ruling. An expansive reading of the Takings Clause could produce effects beyond union organizing, potentially implicating fairly benign government mandates like requiring the posting of certain signage. If the Court adopted Judge Leavy's opinion, a decision may implicate the prevailing standards for union access in the private sector as well. Because of the various possible implications on labor and the increasingly rightward shift of the Supreme Court, this case will be closely monitored.

FIRST CIRCUIT COURT OF APPEALS PLACES LIMITS ON QUALIFIED IMMUNITY DOCTRINE

On November 5, 2020, the United States Court of Appeals for the First Circuit issued its decision in *Irish et al. v. Fowler et al.*, No. 20-1208 (1st Cir. Nov. 5, 2020) which carved out certain exceptions to the qualified immunity doctrine for law enforcement and government officials. The case involved Maine rape victim Brittany Irish who claimed that the police investigating her attack mishandled the case resulting in the accused subsequently attacking her again and killing her husband.

Ms. Irish sued on a theory that her due process rights were violated when the Maine State police detectives who investigated her rape left phone messages for the alleged attacker without knowing his location. The alleged attacker then engaged in threatening behavior, finally attacking Irish and killing her husband.

The First Circuit ruled that the District Court incorrectly dismissed the suit based on the doctrine of qualified immunity, a concept which addresses personal liability for possible misconduct by public officials by balancing the misconduct with whether they perform their duties reasonably. Specifically, qualified immunity attaches and protects a government official from lawsuits where the official violated a "clearly established" statutory or constitutional right, all based on a "reasonable person" standard.

The First Circuit created an exception to qualified immunity for the case where the officials' actions "created or enhanced" the danger and "shock the conscience." Thus, in this case, the Court held that the phone calls by the Detectives were sufficiently reckless as to create additional danger to Irish. Irish had informed the Detectives that she believed that the alleged attacker would have a violent reaction if she went to the police. As a result of the decision, the case will be returned to the trial court which originally dismissed the suit for reconsideration under this new standard.

The First Circuit decision was issued three days after a United States Supreme Court decision in which the Court found that the conditions under which a Texas prisoner was held were so egregious that the officers should have known that they constituted an Eighth Amendment violation for cruel and unusual punishment. *Taylor v. Riojas*, 19-1261, 592 U.S. ____ (2020). Unfortunately, neither the First Circuit nor the Supreme Court offer any bright line guidance as to what sort of conduct should result in a waiver of qualified immunity, rather leaving it to individual courts to determine the issue based on the facts and their own personal moral compass.

EEOC ENDING NEARLY HALF CENTURY OLD CASE AGAINST IRON WORKERS LOCAL 580

In a filing dated November 19, 2020, the Equal Employment Opportunity Commission ("EEOC") moved the United States District Court for the Southern District of New York seeking to vacate a 1978 consent decree from a 1971 case between the government and Local 580 of the International Association of Bridge, Structural, and Ornamental Ironworkers ("Local" or "Union") and replace it with a new agreement. The new consent decree is set to expire in three years and contains a permanent injunction against race or national origin discrimination, while requiring training, record-keeping and reporting by the Local, as well as hiring of an "EEO/compliance officer."

The 1971 lawsuit was filed by the government to address a Union membership which only had 2 non-white members out of 1,400 and 13 out of 71 apprentices. The government now believes that after over forty years of the 1978 consent decree, the Union's membership has been transformed, although not without some rocky moments, as, despite the 1978 consent decree, the Union was held in contempt of the agreement in 1988 and 1998. Now, with African American and Hispanic membership up to 44% and apprentices up to 52%, the EEOC and the Union believe it is time to move on from the original agreement.

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