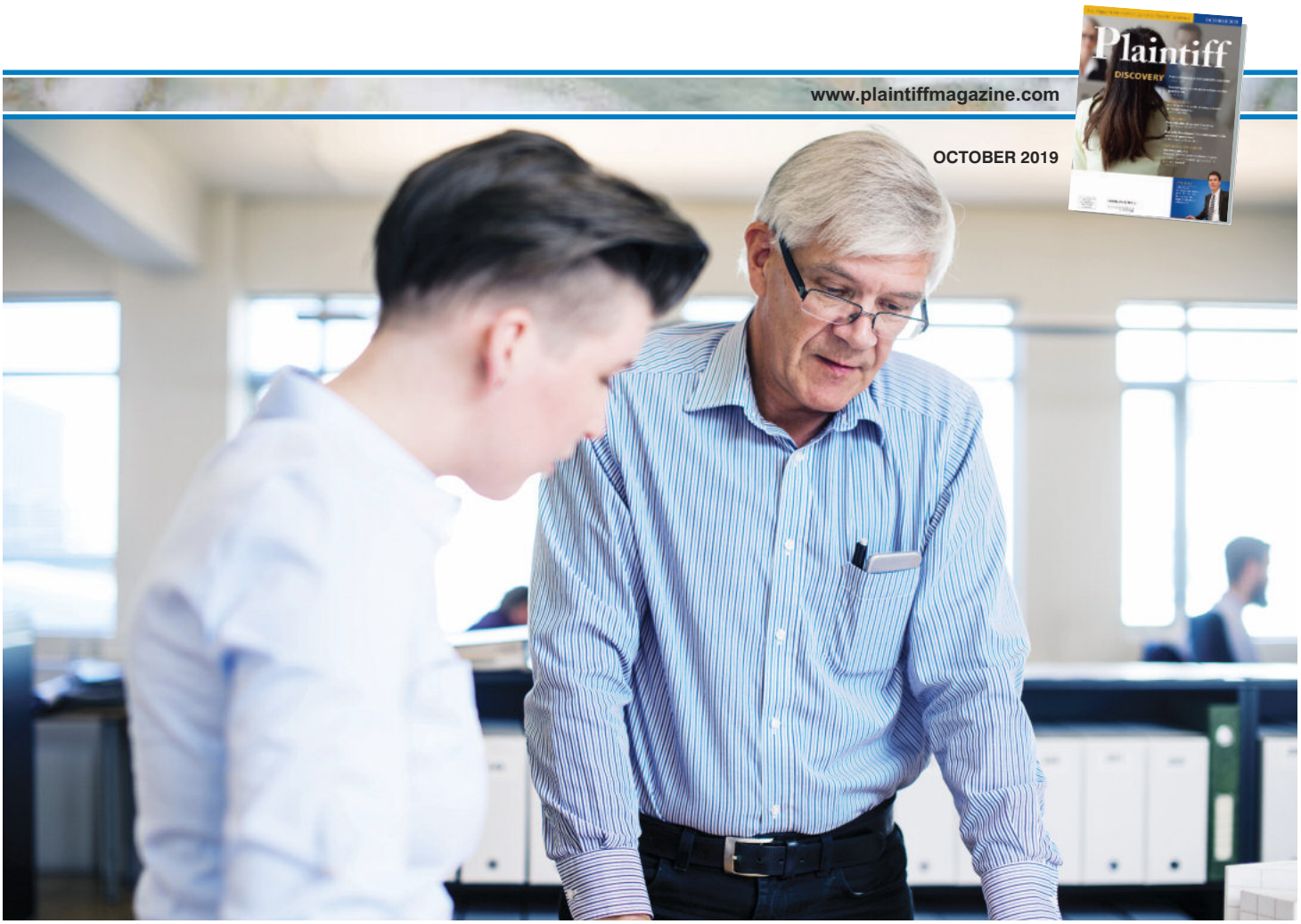

You're fired! The perils of being a worker in Trump's America

An update on the Trump Administration's incessant attacks on workers' rights

By Natasha Távora Baker

Supreme Court to decide if employees can be fired for being gay

On October 8, 2019, the Supreme Court was set to hear three cases on whether "sex" under Title VII of the 1964 Civil Rights Act – which, among other protected characteristics, prohibits workplace discrimination on the basis of "sex" – encompasses sexual orientation and gender identity, too.[1] In *Harris Funeral Homes*, an employee was fired from her job after revealing that she was transgender and would be dressing in accordance with the female dress code for the office. In the other two cases, gay men were fired because of their sexual orientation.

The extent to which LGBTQ+ employees are protected in the workplace varies greatly. Twenty-eight states currently have no protections for LGBTQ+ employees (although a few of those states protect public sector workers).[2] The Obama Administration had interpreted Title VII as prohibiting discrimination on the basis of sexual orientation and gender identity. The Equal Employment Opportunity Commission decided in 2015 to file its first two sex discrimination cases based on sexual orientation.[3] The Trump Administration has reversed course. Though it is not a party to any of the three cases before the Supreme Court, it has chosen to file amicus briefs seeking to deprive workers of their civil rights, asking SCOTUS to rule against the employees and interpret Title VII to not include sexual orientation nor gender identity.

In this political climate, and given the current composition of the Supreme Court, LGBTQ+ advocates and allies are understandably worried. Some are hopeful that since these cases do not involve interpreting the Constitution (as was required in the same-sex marriage case of *Obergefell v. Hodges* (2015) 135 S.Ct.

2584), but are rather Title VII statutory interpretation cases, conservative justices who voted no in *Obergefell* might vote yes here. Advocates also hope that Chief Justice Roberts will remember what he famously said in 2015 during oral argument: "I'm not sure it's necessary to get into sexual orientation to resolve this case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?"

Excellent question, Chief Justice. What is being gay or transgender but "failing" to live up to stereotyped expectations of what it means to be a man or a woman and therefore a matter of sex-based discrimination? If the Supreme Court rules as the Trump Administration hopes it will, be prepared for employers to further engage in sex-based stereotyping, not just by firing or refusing to hire gay and transgender people, but also through their dress codes and office policies and protocols for *all* employees. Expect more cases – many brought by legal organizations such as the so-called Alliance Defending Freedom that promote patriarchal, traditional Christian gender norms in every realm, including in the workplace – to make their way through the federal courts on where exactly to draw the line on "sex."

Religion-justified discrimination

Over the summer, the Department of Labor proposed a rule that would effectively eliminate aspects of Title VII of the 1964 Civil Rights Act as a remedy for the employees of government contractors.[4] The rule both expands the definition of a religious employer and what type of discrimination so-called religious employers can effectuate in the workplace.

The proposed rule dramatically simplifies the criteria for religious employer designation. It does away with the for-profit/non-profit distinction to qualify as a religious employer. To qualify, a government contractor need merely "hold itself out to the public as carrying out a religious purpose [which can be satisfied]… in a variety of ways, including by evidence of a religious purpose on its website, publications, advertisements, letterhead, or other public-facing materials, or by affirming a religious purpose in response to inquiries from a member of the public or a government entity." (p. 41683).

Under this proposed rule, any for-profit government contractor seemingly need only respond "yes" to a call from a government entity as to whether it has a religious purpose to allow it to discriminate against employees based upon religion. These parameters for qualification as a religious employer are so broad as to allow potentially any government contractor to qualify as a religious employer, raising not only serious concerns about discrimination, but also First Amendment entanglement of church and state, if an increasing number of the companies receiving federal taxpayer dollars articulate a supposed "religious purpose."

The proposed rule also greatly expands what kind of discrimination a religious employer can perpetuate. When President Lyndon B. Johnson issued Executive Order 11246 in 1965, the only exemption applicable to religious employers under Title VII was the ministerial exemption, i.e., a religious employer could require that its employees engaged in ministering to the community be of the same faith. (Sec. 204(c).) This exemption makes sense as a congregation would want its spiritual leader to be a person of the same faith. But this proposed rule takes that exemption to an entirely different level.

The proposed rule states that religious employers "can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases." (p. 41679). This could mean that an employer could choose to not hire someone because he or she is in a same-sex marriage and that employer does not "believe" in same-sex marriage. This could perhaps mean that an employer could refuse to hire women because the employer does not "believe" that women should work outside the home. This might mean that an employer could fire someone if the employer finds out that the employee is married to someone of a different faith, because the employer does not "believe" in interfaith marriages. This rule seemingly provides government contractors carte blanche to deem anything a "religious tenet," and therefore be free to discriminate against employees.

The examples listed above are not outlandish hypotheticals. Businesses throughout the U.S. have made note of the Supreme Court's silence in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719 on whether religion allows businesses to discriminate against customers;[5] that businesses could take the same attitude towards employees is a foreseeable extension of this Administration's and the current Supreme Court's decisions. Consider, for example, Texas's recently passed "Chick-fil-A law," which prohibits "adverse actions" against companies or individuals on the basis of their membership, support, or donations to religious groups.[6] The law was in direct response to the San Antonio City Council's decision to not have a Chick-fil-A restaurant in its municipal airport because of the company's well-known anti-LGBTQ+ stance. Chick-fil-A is a for-profit company. Were this Department of Labor rule to go into effect, Chick-fil-A could easily claim to be a religious employer so that, if it contracts with the federal government (say by having a franchise on a military base or catering a government event), it would be free to discriminate against LGBTQ+ employees "without sanction by the federal government."

What is more, Trump has lined up none other than Eugene Scalia, son of the late Justice Antonin Scalia and a fervent

anti-workers' rights lawyer, as his nominee for the next Secretary of Labor. Having Mr. Scalia head the agency in charge of enforcing such a rule should it go into effect is the height of cynicism. Combined with the fact that the Trump Administration provided only a 30-day comment period for a rule that would upend 50 years of civil rights law while the nation was on summer break, Mr. Scalia's nomination speaks volumes of the Administration's hostility not only towards workers, but also towards due process and legal norms (see nepotism).

A watered-down overtime pay rule

In other Department of Labor news, the agency just announced a final rule on overtime pay that starting January 1, 2020, 1.3 million more American workers will be eligible for overtime pay under the Fair Labor Standards Act (FLSA). The rule is a watered-down version of an Obama Administration proposal, which would have expanded overtime pay to around 4 million workers by changing the salary basis test for non-exempt workers to include overtime entitlement for those making up to $47,000 a year for full-time work, and tying future changes to the cost of living. That proposal was met by fierce opposition from various business groups, who teamed up with some Republican-controlled states to take the Obama Administration to court, resulting in the rule being enjoined by a conservative federal judge in 2017. Keep in mind that even adjusting for inflation from when the current salary threshold was adopted would have a salary basis test level for non-exempt status of $55,000/year.

Though it is a much smaller improvement, that the threshold for the salary basis test for non-exempt workers will now be $35,568 a year for full-time work, up from the current level of $23,660 a year, is welcome news after 15 years of waiting. However, the rule also allows employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10% of the standard salary level to determine if the employee qualifies for overtime pay. It is noteworthy that the Department of Labor under Trump went forward with any update on the overtime pay rules, though this Administration's rule does far less than is needed (and far less than was approved by the prior Administration) to help vulnerable workers.

The House and states respond

Given the current makeup of the White House, the Senate, and the federal courts (including some 150+ judges nominated by Trump), the House and (some) states are leading the charge in protecting workers.

Earlier this year, the House passed the Equality Act, which would enshrine LGBTQ+ protections into federal law not only in employment (by explicitly including sexual orientation and gender identity as protected characteristics under Title VII), but in various other realms such as housing and education. As the Republican-controlled Senate has not (and seems very unlikely to) advance the Act, the Supreme Court's decisions in *Harris Funeral Homes* and the accompanying cases are all the more important.

The House also just passed the FAIR Act, which would ban mandatory arbitration agreements in employment and consumer contracts. This bill was in direct response to the Supreme Court's decision last year in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (majority opinion by Trump nominee Neil Gorsuch), which held that mandatory arbitration clauses for private, non-union employment are legal and those clauses can include mandatory waiver of the right to sue in collective and class actions as a condition of employment. That means that for tens of millions of employees, their concerted claims of sexual harassment, discrimination, wage theft, etc. under Title VII, the Fair Labor Standards Act, state wage laws, and other applicable laws can be forced into arbitration. The Trump Administration has been vocal in its support of forced arbitration, which should not be surprising coming from a president who as a businessman was sued repeatedly over workplace violations,[7] has faced many sexual harassment complaints, and nominated someone to the Supreme Court plagued by sexual assault allegations. Unfortunately, like the Equality Act, the FAIR Act will likely stall under this Administration.

The "gig" economy in California

At the state level, California's Governor, Gavin Newsom, recently signed into law AB-5, which will clarify that many "gig economy," so-called independent contractors (think Uber and Lyft drivers and DoorDash deliverers), are in fact employees under California law.[8] As Governor Newsom said, in signing the bill, these employers are promoting a hollowing out of the American middle class by casting aside basic rights like the minimum wage, sick leave, and health care. Looking out for their bottom line, the likes of Uber and Lyft are exploring the idea of a statewide ballot initiative in 2020 to undo the law. In the meantime, California companies – many with national presences – will have to respond to such legislation and may help start a countertrend toward providing worker protections.

Conclusion

The pace with which the Trump Administration is gutting civil rights protections in the workplace is alarming. The Supreme Court cases and the Department of Labor-proposed rule are all related. Trump's strongest support comes from right-wing, predominantly white, evangelical Christians[9] and he will do whatever he can to maintain their support. "Make America Great Again" plays to the notion that the "true" America is one that is white, heterosexual, Christian, and patriarchal.

Plaintiffs' lawyers should be prepared to see more discrimination in the workplace, while key tools of legal relief such

as the FLSA and Title VII are dramatically weakened. Until the federal landscape changes, more effort may need to be concentrated at the state level. Whatever the approach, the Bar should remain vigilant and engaged because workers need our support more than ever.

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Endnotes:

[1] *Altitude Express Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *Bostock v. Clayton Cnty.*, 723 Fed.Appx. 964 (11th Cir. 2018), *R.G. & G.R. Harris Funeral Homes v. EEOC*, 884 F.3d 560 (6th Cir. 2018).

[2] *State Maps of Laws & Policies: Employment*, Human Rights Campaign (June 7, 2019), https://www.hrc.org/state-maps/employment/pdf.

[3] *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination*, Equal Employment Opportunity Commission (March 1, 2016), https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm.

[4] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41677 (proposed Aug. 15, 2019) (to be codified at 41 C.F.R. 60).

[5] Heron Greenesmith, *Refusal of Interracial Couple Shows How Slippery the Slope of LGBTQ Refusal Really Is*, Rewire News (Sept. 11, 2019), https://rewire.news/religion-dispatches/2019/09/11/refusal-of-interracial-couple-shows-how-slippery-the-slope-of-lgbtq-refusal-really-is/.

[6] Devan Cole, *Texas governor signs controversial 'Save Chick-fil-A' bill*, CNN (June 12, 2019), https://www.cnn.com/2019/06/12/politics/texas-save-chick-fil-a-bill-greg-abbott/index.html.

[7] Ned Resnikoff, *Hundreds of Donald Trump's Employees Have Sued For Alleged Labor Infractions*, International Business Times (March 14, 2016), https://www.ibtimes.com/ political-capital/hundreds-donald-trumps-employees-have-sued-alleged-labor-infractions-2336166.

[8] Megan Rose Dickey, *California Governor Gavin Newsom signs gig worker bill AB-5 into law*, TechCrunch (Sept. 18, 2019), https://techcrunch.com/2019/09/18/california-governor-gavin-newsom-signs-gig-worker-bill-ab5-into-law/.

[9] Philip Schwadel and Gregory A. Smith, *Evangelical approval of Trump remains high, but other religious groups are less supportive*, Pew Research Center (March 18, 2019), https://www.pewresearch.org/fact-tank/2019/03/18/evangelical-approval-of-trump-remains-high-but-other-religious-groups-are-less-supportive/.