

EMPLOYMENT AND LABOR LAW
YEAR IN REVIEW
November 9, 2023

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EMPLOYMENT CASES DECREASE

IN 2022 JUST 20,994 EMPLOYMENT CASES FILED---AN 18.5% DROP
FROM 2012

U.S SUPREME COURT

Groff v. Dejoy, 143 S.Ct. 2279 (2023)

- **Title VII requires employer that denies a religious accommodation to show the burden of granting an accommodation would result in *substantial increased costs in relation to the conduct of its particular business.***
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- For decades federal courts read *Hardison* for more than it was worth. By blessing “the denial of even minor accommodation in many cases,” the *de minimis* test made it harder for members of minority faiths to enter the job market. No more. *Groff* enables Americans of all faiths to earn a living without checking their religious beliefs and practices at the door.
- *Hebrew v. Tex. Dep’t of Crim. Justice*, 80 F.4th 717 (5th Cir. Sept. 15, 2023)

303 Creative LLC v. Aubrey Elenis, 143 S.Ct. 2298 (2023)

- **First Amendment prohibits state from forcing website designer to create expressive designs that convey a message contrary to the designer's religious beliefs.**
- For first time in its history Court grants a business open to the public a constitutional right to refuse to serve members of a protected class...and that the company has a right to post a notice that says “no [wedding websites] will be sold if they will be used for gay marriages---Dissent

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***Students for Fair Admissions, Inc. v. President and
Fellows of Harvard College, et. al., 143 S.Ct. 2141 (2023)***

Consideration of race in college admission decisions violates Equal Protection Clause of 14th Amendment.

“How else but ‘negative’ can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?.

Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39, 143 S.Ct. 677
(2023).

Offshore oil rig employee who earned more than \$200,000 annually and whose paychecks were based solely on a daily rate (without overtime) is not paid on a salary basis and thus a non-exempt employee entitled to overtime pay under the Fair Labor Standards Act.

**Glacier Northwest, etc. v. Teamsters
Local No. 174, 143 S. Ct. 1404
(2023)**

National Labor Relations Act did not preempt an employer's tort claims alleging that its employees' labor union intentionally destroyed company property during a labor dispute.

***Health and Hosp. Corp., etc. v. Talevski*, 143 S. Ct. 1444
(2023)**

The Federal Nursing Home Reform Act (“FNHRA”) creates private right of enforcement under 42 U.S.C. §1983.

Employment-related Spending Clause implied rights of action may be enforced through “laws” provision of Section 1983.

Grants of Certiorari for Oct. 2023 Term

1. *Muldrow v. City of St. Louis, Mo.* No. 22-193, 143 S.Ct. 2686 (2023) (Argument 12-3-23)

Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage

See: Dennison v. Indiana Univ of Pa., 2022 U.S. Dist. Lexis 141164; 2022 WL 3213657 (W.D. Pa. Aug. 9, 2022), *on appeal submitted* Sept. 12, 2023).

Klingensmith v. Armstrong School Dist., 2022 U.S. Dist. Lexis 231395, 2022 WL 1790246 (W.D. Pa. Dec. 23, 2022)

2. *Murray v. UBS Securities, LLC*. No 22-660, 143 S.Ct. 2023 (2023)

Under the burden-shifting framework that governs Sarbanes-Oxley Act of 2002, cases, must a whistleblower prove his employer acted with a “retaliatory intent” as part of his case in chief, or is the lack of “retaliatory intent” part of the affirmative defense on which the employer bears the burden of proof?

Oral Argument Oct. 10, 2023

3. *Lindke v. Freed, 143 S.Ct. 1780 (2023)*

Oral Argument, Oct. 31, 2023

Whether a public official’s social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

4. *Acheson Hotels, LLC v. Laufer* No. 22-429, 143 S.Ct. 1053 (2023)

Does a self-appointed Americans with Disabilities Act “tester” have Article III standing to challenge a place of public accommodation’s failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place.

Oral Argument Oct. 4, 2023

TEA LEAVES

- ***Kincaid v. Williams***, 143 S.Ct. 2414 (June 30, 2023) (dissent from denial of cert)
 - Denied cert on whether ADA covers gender dysphoria in a dispute involving transgender woman).
 - (Justice Alito, joined by Thomas, dissented from Court's denial of certiorari on question of whether gender dysphoria (i.e. psychological distress caused by conflict between person's gender identity and their assigned sex at birth) is covered by definition of disability in ADA, 42 U.S.C. §12211(b).
 - *See Guthrie v. Noel*, 2023 U.S. Dist. LEXIS 161325 (M.D. Pa. Sept. 11, 2023)(gender dysphoria is not condition excluded from statutory definition of disability).
- ***City of Ocala, Fla v. Rojas***, 143 S.Ct. 764 (2023)
 - Court denied cert on question of whether atheists who attend a prayer vigil organized by a municipal police department had standing to contest religious

THIRD CIRCUIT

***O'Brien v. Middle East Forum*, 57 F.4th 110 (3d Cir, 2023)**

Director was the employer's proxy or alter ego, and the district court erred in overruling the employee's objection to instructing the jury on the availability of an affirmative defense under Faragher/ Ellerth;

The district court erred in failing to instruct the jury that the Faragher/ Ellerth defense would be unavailable if it found that the director was a proxy for the employer; -The failure to instruct on proxy liability was harmless because the jury did not find that the employee had been sexually harassed by the director, and the affirmative defense under Faragher/ Ellerth was irrelevant.

***Nitkin v. Main Line Health*, 67 F.4th 565 (3d Cir. 2023)**

Analysis of severe or pervasive conduct sufficient to support hostile environment claim.

***Kairys v. S. Pines Trucking, Inc.*, 75 F.4th 153 (3d Cir. 2023)**

Facts sufficient to show pretext; liability under Section 510 of ERISA. Collateral Estoppel not created by advisory jury findings

Fenico v. City of Philadelphia, 70 F.4th 151 (3d Cir. 2023).

First amendment retaliation

STANDING

***Associated Builders & Contrs. Western Pa. v. CCAC*, 81 F.4th 279 (3d Cir. Aug. 29, 2023)**

Construction industry group admitted it did not experience harm from the project labor agreement. The Court left open the door for the construction industry group to sue in the future if it experienced harm.

***Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. Aug. 29, 2023)**

Standing to challenge Pa. R. Prof. Conduct 8.4(g).

An attorney who gives continuing legal education presentations about First Amendment protections for offensive speech lacked standing to challenge Pa. R. Prof. Conduct 8.4(g), because the Rule did not generally prohibit him from quoting offensive words or expressing controversial ideas; nor would he be disciplined for his planned speech.

***Clemens v ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022)**

Clemens had standing to assert her contract, tort, and secondary contract claims arising from her employer's data breach. . For all claims, she had alleged a future injury—the risk of identity theft or fraud—that was sufficiently imminent.

Higgins v. Bayada Home Health Care Inc., 62 F.4th 755 (3d Cir. 2023).

PTO is Fringe Benefit, Not Salary or Wage under FLSA. Waiving Best Argument

***Tyger v. Precision Drilling Corp.*, 78 F.4th 587 (3d Cir. 2023)**

FLSA Compensable Activities for donning and doffing

Not all work clothes are alike. Some are simply aesthetic, others crucial to the work performed.

***Doe v. Scalia*, 58 F.4th 708 (3d Cir. 2023)**

OSHA Preclusion for Covid Investigation

U.S. DISTRICT COURT FOR
WESTERN DISTRICT OF
PENNSYLVANIA

Doe v. Pittsburgh Reg'l Transit, 2023
U.S. Dist. LEXIS 132278 W.D. Pa.
July 31, 2023)

**Failure to accommodate religious belief not itself an
adverse employment action, if employee complies with
employer's work requirement**

***Guthrie v. Noel*, 2023 U.S. Dist. LEXIS 161325 (M.D. Pa. Sept. 11, 2023)**

Gender dysphoria is not condition excluded from statutory definition of disability under Americans with Disabilities Act.

Ference v. Roman Catholic Diocese of Greensburg, 2023
U.S. Dist. Lexis 183161 (W.D. Pa. Oct. 11, 2023).

Ference v. Roman Catholic Diocese of Greensburg, 2023
U.S. Dist. Lexis 8416 (W.D. Pa. Jan. 18, 2023)

Speech and religion exceptions to Title VII sex
discrimination action.

NLRB

NLRB DISALLOWS CONFIDENTIALITY And Non-Disparagement Provisions in Settlement Agreements.

McLaren Macomb and Local 40 RN Staff Council,
372 NLRB No. 58 (N.L.R.B.), 2023 WL 2158775
(Case 07-CA-263041, Feb. 21, 2023).

NATIONWIDE BAN ON NON-COMPETITION PROVISIONS

On January 5, 2023, the Federal Trade Commission proposed a rule that would ban essentially all noncompete agreements for all public and private employers of any size throughout the entire United States, including non-competes that are currently in force

**NLRB EXPANDS REMEDIES FOR
UNFAIR LABOR PRACTICES *Thryv,
Inc. and International Brotherhood of
Electrical Workers, Local 1269*, 372 NLRB
No. 22 (N.L.R.B.), 2022 WL 17974951 (20-
CA-250250 and 20-CA-251105, Dec. 13,
2022).**

NLRB by a 3-2 decision expanded the available remedies for union members bringing an unfair labor practice against employers. The ruling requires employers to compensate workers for “all direct or foreseeable” harm resulting from a violation of the National Labor Relations Act or other labor law violation.

NLRB Overrules *Boeing* Standard

Stericycle Inc. 372 NLRB 113 (Aug. 2, 2023)

Boeing Standard

- Evaluation of Facially Neutral Rule,
 - Reasonably could be interpreted To Interfere with EE Section 7 Rights
 - Nature and Extent of Potential Impact of affected §7 Rights
 - Against
 - ER's Legitimate Justifications for Rule or policy



New
Stericycle Inc.
Standard

- Rule has reasonable tendency to chill Employee Exercise of §7 rights
- Presumptively Unlawful
- ER can rebut by showing:
- Rule advances legitimate and substantial business interest, **and**
- ER unable to advance interest with more narrowly tailored rule

FEDERAL STATUTES

LACTATION ROOMS, THE PWFA AND THE PUMP ACT

On December 22, 2022, Congress passed the new Pregnant Workers Fairness Act

(“PWFA”); and expanded rights for nursing mothers under the Providing Urgent Maternal Protections for Nursing Mothers Act (“the PUMP Act”).

NO FORCED ARBITRATION OF SEXUAL HARASSMENT CLAIMS

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 9 U.S.C. §401-02, an amendment to the Federal Arbitration Act, renders unenforceable arbitration agreements compelling arbitration of sexual harassment cases.

If the “case” included plausible sexual harassment claims (as well as other discrimination claims), entire case would not be subject to arbitration. *Johnson v. Everyrealm, Inc.*, 2023 U.S. Dist. LEXIS 31242 (S.D. N.Y, Feb. 24, 2023).

Practice tip: A plausible sexual harassment allegation may avoid compelled arbitration. Employee’s counsel must plead the sexual harassment claim in detail to avoid a motion to dismiss under *Iqbal* and *Twombly*

PENNSYLVANIA SUPREME
COURT

Javitz v. Luzerne County, 293 A.3d 570 (Pa. May 5, 2023)

Pa. Whistleblower Law plaintiff need only show a causal connection by circumstantial evidence.

For example, the fact employee received positive performance evaluations prior to her report and then negative changes in her treatment is itself sufficient to show causation.

PA. REGULATIONS

16 Pa. Code § 41 Protected Classes under the Pa. Human Relations Act, and Pa. Fair Education Opportunity Act.

Clarifies definition of “sex” to include:

- (1) Pregnancy;**
- (2) Sex assigned at birth;**
- (3) Gender, including a person's gender identity or gender expression.**
- (4) Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality and asexuality;**
- (5) Differences of sex development, variations of sex characteristics or other intersex characteristics.”**