

ABA JOURNAL OF
Labor & Employment Law

The Journal of the ABA Section of Labor and Employment Law
Volume 35, Number 3, 2021

Editors' Page	v
<i>Miriam A. Cherry, Matthew T. Bodie & Marcia L. McCormick</i>	
Labor and Employment Decisions from the Supreme Court's 2018–19 Term	383
<i>Peggie R. Smith</i>	
Arbitrators' Review of Bullying in the Workplace	399
<i>Stacy A. Hickox & Michelle Kaminski</i>	
The Case of the Dozing Decider: Tips for Dealing with a Napping Neutral	449
<i>Stephen Douglas Bonney</i>	
"Equal Opportunity Harasser" Doctrine: Flawed, Pernicious, Abrogated	473
<i>Marianna McLean</i>	
A New Global Mandate to End Violence and Harassment in the World of Work: A Gender-Responsive Approach	493
<i>Eric Stener Carlson & Shauna Olney</i>	
The Pandemic-Era and Broader Implications of Employer Decision-Making in Workplace Injury Cases	511
<i>Travis Livermore</i>	
Transgender Inclusive Employer Health Benefits for Employees and Dependents	541
<i>Taylor Y. Edwards</i>	

EDITORIAL STATEMENT: The *ABA Journal of Labor & Employment Law* is a journal of ideas and developments in all areas of labor and employment law designed to provide balanced analysis for practitioners, judges, administrators, neutrals, academics, and the interested public. The *Journal* provides an opportunity for members of the labor and employment bar to share insights and perspectives on practical issues of current interest while encouraging discussion of their broader policy implications. The *ABA Journal of Labor & Employment Law* may be cited as follows, by volume and page: 35 A.B.A. J. LAB. & EMP. L. 1 (2020).

EDITORIAL GUIDELINES FOR AUTHORS: The *ABA Journal of Labor & Employment Law* welcomes contributions from all interested persons. Articles preferably should be submitted electronically as a Microsoft Word document attachment to abajle@slu.edu, or by mail to the **ABA Journal of Labor & Employment Law, Saint Louis University School of Law, 100 North Tucker Boulevard, St. Louis, MO 63101.** Questions may be directed to the faculty co-editors: Professor Matthew T. Bodie (matthew.bodie@slu.edu, 314-977-7507), Professor Miriam A. Cherry (miriam.cherry@slu.edu, 314-977-4537), and Professor Marcia L. McCormick (marcia.mccormick@slu.edu, 314-977-4263). Manuscripts should generally be between twenty-five and forty pages, roughly 10,000 words, with text and footnotes double-spaced. Citations of authority should appear in the footnotes. Additionally, the author's name should be followed by a star footnote (*), providing information that identifies the nature of the author's work—management, labor or employee-side, neutral, or academic, for example. In preparing both text and footnotes, authors should refer to the following works for style and form: *The Bluebook: A Uniform System of Citation* (21st ed. 2020); for matters of literary style not covered by this manual, *The Chicago Manual of Style* (17th ed. 2017), *The Elements of Style* (4th ed. 1999), or *The Redbook: A Manual of Legal Style* (4th ed. 2018).

STUDENT SUBMISSIONS: The *ABA Journal of Labor & Employment Law* does not accept direct submission of articles from law students. We do, however, publish the winning article in the American Bar Association Section of Labor and Employment Law and College of Labor and Employment Lawyers Annual Law Student Writing Competition, which is open only to U.S. law students. For competition rules, see <https://www.slu.edu/law/academics/journals/aba-labor-employment-law/student-writing-competition.php>.

PERMISSIONS: To request to reproduce any portion of the *ABA Journal of Labor & Employment Law*, please visit americanbar.org/reprint.

DISCLAIMER: The material contained herein represents the opinions of the authors and does not express the views or the positions of the American Bar Association or the Section of Labor and Employment Law, unless adopted pursuant to the bylaws of the Association and the Section and so indicated. © 2021 American Bar Association. All rights reserved. Printed in the United States of America. Produced by ABA Publishing.

SUBSCRIPTION PRICES: Any member of the American Bar Association may join the Section upon payment of its annual dues of \$75.00. Section membership includes a subscription to the *ABA Journal of Labor & Employment Law*. Law Student Division members of the American Bar Association may join the Section without charge. Institutions and individuals not eligible for Association membership may subscribe to the print version of the *ABA Journal of Labor & Employer Law* by contacting the ABA Service Center; phone: 800-285-2221; e-mail: service@americanbar.org. Digital subscriptions are available through HeinOnline, mail@wshein.com, 800-828-7571 (or 716-882-2600). Membership dues in the American Bar Association are not deductible as a charitable contribution for federal income tax purposes. However, such dues may be deductible as a business expense.

ORDER INFORMATION: Current issues of the *ABA Journal of Labor & Employment Law* may be obtained from the ABA Service Center, American Bar Association, 321 North Clark Street, Chicago IL 60654-7598; phone: 800-285-2221; fax: 312-988-5550; e-mail: service@americanbar.org. Back issues of the *ABA Journal of Labor & Employment Law* or its predecessor title, *The Labor Lawyer*, published two years ago and earlier may be purchased from William S. Hein & Co., 2350 N. Forest Road, Getzville, NY 14068; phone: 800-828-7571.

FREQUENCY AND POSTAGE: The *ABA Journal of Labor & Employment Law* (ISSN: 2156-4809 (print); 2329-4604 (online)) is published three times per year by the American Bar Association, Section of Labor and Employment Law. Third-class postage is paid at Chicago, IL, and additional mailing offices.

ADDRESS CHANGES: Send all address changes to the *ABA Journal of Labor & Employment Law*, ABA Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598; phone: 800-285-2221; e-mail: service@americanbar.org.

INTERNET ACCESS: Visit the *ABA Journal of Labor & Employment Law* home page at the Saint Louis University School of Law: <https://www.slu.edu/law/academics/journals/aba-labor-employment-law/index.php>. Articles previously published in the *ABA Journal of Labor & Employment Law* or its predecessor title, *The Labor Lawyer*, are available at <https://www.slu.edu/law/academics/journals/aba-labor-employment-law/index.php>.



ABA JOURNAL OF
Labor & Employment Law

The Journal of the ABA Section of Labor and Employment Law

EDITORS

Professor Matthew T. Bodie
Callis Family Professor of Law
Co-Director, William C. Wefel Center
for Employment Law

Professor Miriam A. Cherry
Co-Director, William C. Wefel
Center for Employment Law
Associate Dean for Research
& Engagement

Professor Marcia L. McCormick
Professor of Law
Saint Louis University School of Law
St. Louis, MO

AMERICAN BAR ASSOCIATION EDITORIAL BOARD

Christine Godsil Cooper, *Chair*

Joel A. D'Alba
Barbara L. Johnson
Paul W. Mollica
Howard Shapiro

Barry A. Hartstein
Ellen C. Kearns
Julie Richard-Spencer
James I. Singer

STUDENT EDITORIAL BOARD

VOLUME 35 2020–2021

EDITOR-IN-CHIEF

Rebecca James

LEAD MANAGING EDITOR

Reid Simpson

MANAGING EDITORS

Taylor Edwards
Katie Little
Alyssa Ransom

ARTICLES EDITORS

Stephanie Milner
Hánnah Smith

NOTE AND COMMENT EDITORS

Ellen Bruntrager
Luke Klein
Binh Nguyen

SYMPOSIUM LEAD

Nate Vize

STAFF EDITORS

Jacob Baran
Chelsea Betcher
Olivia Dinwiddie
Sarah Johnson
Joseph Paglisotti

Blaise Beebe
August Bonacci
Dohen Gallaher
Carley Kulenkamp
Elisa Sullivan

Sophia Besancenez
Alexander Curl
Paul Hess
Peter Lucier
Hannah Wissler

Saint Louis University School of Law
St. Louis, MO

The Editors' Page

As of this writing, the pandemic has created tumultuous times for many workers and employers. The law continues to process changes in the employment relationship around health and safety, and meanwhile the Supreme Court has handed down significant decisions impacting employment discrimination jurisprudence and arbitration. As such, the dual themes for this issue of the *Journal* are arbitration and employment discrimination.

The first article in this issue is the Supreme Court annual review, which has been a tradition of the *Journal* each year for over two decades. In her review, Washington University Law School Professor **Peggie R. Smith** reviews the *Labor and Employment Decisions from the Supreme Court's 2018–19 Term*. She examines the cases that the Supreme Court heard during the 2018–2019 term that were relevant to the context of labor and employment law. While the term was devoid of “blockbuster” labor and employment law cases, Smith posits that several of the cases will have important implications for workplace rights, mainly those that touch on workplace discrimination and arbitration agreements. A handful of other cases were also examined, touching on a range of worklaw issues. The cases examined include the following: *Mount Lemmon v. Guido*; *Fort Bend County Texas v. Davis*; *Yovino v. Rizo*; *Henrey Schein, Inc. v. Archer and White Sales, Inc.*; *New Prime v. Oliveira*; *Lamps Plus, Inc. v. Varela*; *Dawson v. Steager*; *BNSF R.R. Co. v. Loos*; *Biestek v. Berryhill*; and *Parker Drilling Management Services, Ltd. v. Newton*.

The second article in this issue comes from Professors **Stacy A. Hickox** and **Michelle Kaminski** and is titled *Arbitrators' Review of Bullying in the Workplace*. The article first focuses on the impact of bullying in the workplace, including the general lack of employer policies to stop such behavior. After setting the scene, the article reviews judicial approaches to workplace bullying as well as examining arbitration as an alternative. The article then examines over 130 arbitration awards. The authors highlight several unique and creative approaches to the reduction of bullying as demonstrated in arbitration awards. The article concludes by offering recommendations to employers and unions about how to address workplace bullying.

Continuing with the arbitration theme is an article titled *The Case of the Dozing Decider: Tips for Dealing with a Napping Neutral*, written by full-time labor and employment arbitrator and mediator **Stephen Douglas Bonney**. This practitioner-focused article touches upon a unique and interesting topic: the scope of problems presented by inattentive and sleeping arbitrators. The article reviews

the ways that courts have dealt with litigation seeking to vacate arbitration awards based on claims that the arbitrator slept through part of the hearing. Some of the science and reasons why this phenomenon is more common than it may seem are also discussed. The article suggests best practices for what arbitrators can do to prevent these issues as well as how advocates should respond if they confront an inattentive arbitrator.

Shifting toward the area of employment discrimination, commercial litigation and employment law practitioner **Marianna McLean** covers significant and timely developments in her article ***“Equal Opportunity Harasser” Doctrine: Flawed, Pernicious, Abrogated***. This article argues that the “equal opportunity harasser” doctrine in its current form (1) contravenes Title VII; (2) all the more clearly violates the Civil Rights Act of 1991 as interpreted by *Desert Palace v. Costa*; and (3) is now abrogated by the Supreme Court’s decision protecting sexual orientation in *Bostock v. Clayton County*. The author applies *Desert Palace* and *Bostock* to the “equal opportunity harasser” doctrine, concluding that, although neither case analyzed that doctrine explicitly, their logic undercuts this deeply misguided and troubling jurisprudence. Instead, the article proposes a different framework for analyzing sexual harassment claims where both genders may have suffered harassment. Rather than ask if harassment is directed collectively at employees of only one gender (or if one gender suffers more harassment than the other), courts should instead analyze each harassment claim separately and allow each plaintiff to present to a fact finder the evidence of gender discrimination.

The next article in this issue was written by **Eric Stener Carlson** and **Shauna Olney** titled ***A New Global Mandate to End Violence and Harassment in the World of Work: A Gender-Responsive Approach***. This article focuses on the International Labor Organization (ILO) and its adoption of Convention No. 190 and Recommendation No. 206 concerning the elimination of harassment in the world of work. These ILO instruments build on previous instruments, which had tended to equate gender-based violence with violence against women. The authors note that the new Convention sets a clear framework of rights and measures for the prevention of and protection against gender-based violence and harassment, with the Recommendation providing a range of practical steps that could be taken to implement this framework in other contexts. The article concludes that the ILO instruments expand the concept of gender-based violence and harassment in an inclusive and forward-thinking way, providing expanded protection.

The next article in this issue concerns workers’ compensation in the era of COVID-19. Titled ***The Pandemic-Era and Broader Implications of Employer Decision-Making in Workplace Injury Cases*** and written by practitioner **Travis Livermore**, this article

explores the impact of the employer's choices in workplace injury cases on its liability in other areas of the law such as discrimination, disability, injury recordkeeping, and retaliation. It also considers the way in which the COVID-19 pandemic has an impact on the ways in which employers address workplace safety, manage injuries, and may be subject to liability. The author argues that, to reach decisions in workplace injury cases without inadvertently basing decisions on impermissible considerations or setting themselves up for liability in other areas, employers must consider the full panoply of consequences relating to their decisions, and they must do so within the context of the pandemic's sweeping effect.

The final article in this issue is a student note written by *Journal* student Managing Editor **Taylor Edwards** titled ***Transgender Inclusive Employer Health Benefits for Employees and Dependents***. The note discusses the implication of the Supreme Court's *Bostock* decision on transgender rights, primarily relating to the Affordable Care Act's (ACA's) mandatory coverage provisions. The note argues that, even in the absence of a federal statutory requirement, employers should offer health plans that are nondiscriminatory under Title VII and the ACA and are trans-inclusive, noting that employer-sponsored transgender inclusive health benefits can support and attract a competitive, diverse workforce.

We very much appreciate the work of the *Journal's* student board, staff editors, and authors who have contributed to bringing this issue to you.

Professor Miriam A. Cherry
Professor Matthew T. Bodie
Professor Marcia McCormick
Faculty Co-Editors

