11-1-2010

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Date : November 1, 2010

Ellen Dannin, *Hoffman Plastics as Labor Law—Equality at Last for Immigrant Workers?*, 44 **U.S.F. L. Rev.** 393 (2009), available at SSRN.

In *Marbury v. Madison*, the Supreme Court early on affirmed as "indisputable" the rule "that where there is a legal right, there is also a legal remedy" and "that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, Commentaries *23, *109).

But while black letter law so instructs, employee status under the National Labor Relations Act does not always guarantee backpay to victims of unfair labor practices—or so explains Ellen Dannin in her well-documented review of the by now infamous labor-immigration case, *Hoffman Plastics Compounds, Inc. v. N.LR.B.*, 535 U.S. 137 (2002). Her article, which was part of the University of San Francisco's symposium issue—*The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law*—meticulously dissects the language of the Supreme Court's opinion and the oral argument to show that *Hoffman Plastics*' holding—that employers are not liable in backpay for violating the labor law rights of undocumented workers—is not an anomaly. Instead, it fits neatly into an historical trend of judicial amendments to the NLRA.

Dannin's bottom line is that judicial hostility towards unions and labor law manifested itself in early decisions, such as *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) and *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942), where the Court eliminated backpay remedies for workers who had the audacity to exercise their fundamental labor rights in a manner that violated some other law. When the seamen in *Southern Steamship* participated in a one-day peaceful sit-in strike aboard a ship in response to serious employer violations of their rights, the Court characterized that conduct as a "mutiny" in violation of federal law. And when the workers in *Fansteel* protested their employer's unlawful refusal to recognize their union by engaging in a sit-in strike, the Court had no difficulty eliminating their backpay remedy—and remedies for all workers found guilty of conduct unlawful under other laws and for which they had been punished—even though Fansteel itself was willing to rehire those workers, so long as they renounced their labor rights under the NLRA.

Dannin shows that those decisions, which left serious labor violations unremedied, coupled with the Supreme Court's bald declaration in *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938), that the NLRA does not authorize punitive remedies, predictably leads to the result in *Hoffman Plastics*. The one area in which undocumented workers are treated equally with other workers is in having the statutory right to organize under the NLRA while having no right to an effective remedy when their employer unlawfully terminates them for exercising that right.

Dannin criticizes those aspects of the Court's judicial amendment process resulting in the Court's evisceration of the NLRA's remedies as part of its deradicalization (to borrow Professor Karl Klare's lingo) of the NLRA. Dannin's critical analysis is powerful. Its persuasive force comes from the evidence presented of the Court's progressive overstepping of the boundaries established as part of the separation of powers—that the Court judicially amended the NLRA in ways that Congress had either refused to do or had already undone by legislative enactment. To support that argument, Dannin points to rejected congressional proposals that the Court reinserted into labor law by way of *Fansteel*, *Southern Steamship*, and later on *Hoffman Plastics*. And so, these early cases reinserted congressionally rejected common law concepts. These early cases also reconceived the NLRA as a general law to right all wrongs—a framework rejected by

Members of Congress, who thought that the Norris-LaGuardia Act and state and local laws were sufficient to remedy such acts of misconduct; the *Fansteel* Court's insistence on withholding the backpay remedy from workers who engaged in such misconduct negates that congressional intent. Moreover, these early cases also ignored the plain language of NLRA Section 10(c) to displace the focus of the appropriate inquiry (What is a proper remedy in light of the NLRA's purposes?) to an inappropriate inquiry, which focuses on the worthiness of the workers themselves. And finally, these cases have recast NLRA rights and purposes as individual rather than communal rights—"a change," Dannin observes, "that fundamentally affects the NLRA's purposes and policies." (P. 413.)

This analysis leads Dannin to the article's most intriguing inquiry: "What is difficult to understand is why there was sufficient support to enact a series of pro-labor laws, including the NLRA, yet, at the same time, a judiciary that felt free to impose its own views on the law." (P. 419.) Once again, Dannin's analysis is peppered with historical data to support her theory that the "[c]ountervailing forces that weakened the NLRA and NLRB included opposition to unions and collective bargaining encouraged by economically powerful groups in support of ultra-conservative programs and a divided union movement." (P. 420.) Dannin pauses to note that "similar forces and climates exist today." (P. 420.)

Dannin ends on a pragmatic and cautionary warning to those of us who care about preserving and enforcing rights gained through legislation: Judges, who are empowered to interpret labor laws, tend to hold views antithetical to the NLRA's values and purposes. We ignore those viewpoints at our peril. Instead, we must understand those countervailing forces and combat them with proven strategies, such as those employed by the NAACP Legal Defense Fund during the Civil Rights Movement and the National Right to Work Legal Defense Fund today. In Dannin's view, a well-planned legal strategy could result in a labor law enforced as written—to encourage the practice and procedure of collective bargaining.

Cite as: Anne Marie Lofaso, *Judicial Amendments Treating Citizen and Immigrant Workers Equally . . . Badly: Labor Rights Without Effective Remedies*, JOTWELL (November 1, 2010) (reviewing Ellen Dannin, *Hoffman Plastics as Labor Law—Equality at Last for Immigrant Workers?*, 44 **U.S.F. L. Rev.** 393 (2009), available at SSRN), https://worklaw.jotwell.com/judicial-amendments-treating-citizen-and-immigrant-workers-equally-badly-labor-rights-without-effective-remedies/.