Essay

PSYCHOLOGICAL REALISM IN LABOR LAW

PAUL M. SECUNDA*

ABSTRACT

Facts matter in labor law cases. But not in the way that labor scholars of a generation ago understood. Those scholars posited that judicial perception of facts reflected previously-held values and assumptions rather than record evidence. Yet crucially, those scholars did not describe the mechanism by which judges’ values came to shape facts in labor cases.

Psychological realism in labor law asserts that judges in labor cases are generally not self-conscious partisans but rather decisionmakers who seek most of the time to get the law right without being ideologically committed to any prior legal or political view. Yet, values matter because judges, as human beings, cannot help but to act based on their culturally-informed perceptions of legally consequential facts.

So what appears to be an “honest mistake” to one judge may seem to be equally clear to another judge to be a well thought out scheme to defraud. Indeed, different interpretations of legally-consequential facts are especially prevalent in labor law cases where decisionmakers naturally align themselves, based on their cultural worldviews, with employer or employee interests.

By understanding the mechanism by which values influence decisionmakers in labor law cases, it is possible to consider ways to reduce needless cultural conflict over, and discontent with, the law. To this end, this Essay renews the call for specialized labor courts in the United States.

PEOPLE MAKE MISTAKES. EVEN ADMINISTRATORS OF ERISA PLANS.¹

I. INTRODUCTION

John Langbein was right.² The Supreme Court does not understand employee benefits law under ERISA (or if they do, they seem inevitably, and remarkably, to side with business

---

* Associate Professor of Law, Marquette University Law School.
2. John Langbein Mertens Cite.
interests most of the time). What was once supposed to be an employee benefit protection act has become essentially an employer security law.

Case in point: the recent ERISA Supreme Court case of Conkright v. Frommert. The case addressed the important question of whether a court must continue to give deference to a plan administrator's interpretation of a pension plan even after the administrators’ first interpretation had been found by a court to be arbitrary and capricious, and therefore, unlawful under the Firestone deference standard.

In a nutshell, the case came down to Chief Justice Roberts’ (and his fellow conservatives') belief that Xerox had made "just one honest mistake" in interpreting the plan arbitrarily and capriciously in the first place. Everything else in the opinion inevitably followed from this sentiment in the first sentence of Roberts’ opinion.

Because Xerox had been merely guilty of committing an honest mistake, it then reasonably followed that Xerox should receive a second bite at the apple in saying how the pension plan should be interpreted. The case was therefore sent back to the district court to properly defer under Firestone to Xerox’s second interpretation of the plan, which unremarkably will deprive the plaintiff pensioners of a substantial sum of retirement income.

It did not end up mattering that the record the Supreme Court reviewed was replete with strong evidence that Xerox had purposefully interpreted its pension plan, over a ten year course of conduct, in the way it did to enrich its coffers. Rather than an "honest mistake" on Xerox's part, the pensioners’ attorneys had passionately argued in front of the Supreme Court that it was all a well-thought out ruse to deny these former employees their rightfully-earned pension benefits.

Some would cynically argue that Frommert is just another in a long line of labor and employment law cases in which conservative Justices have come down on the side of business

3. John Langbein Mertens Cite. See also Stephanie Mencimer, Alito: The Chamber of Commerce’s Supreme Court Ringer?, Mother Jones, (June 9, 2010), http://motherjones.com/mojo/2010/06/alito-chambers-high-court-ringer (last visited June 11, 2010) (“As it turns out, the five-justice conservative majority ruled in the chamber's favor in 64 percent of the cases, and even more often--71 percent--in the closely divided cases, which included Citizens United and the Lilly Ledbetter case involving gender discrimination.”).


interests. They decided on the outcome they wanted to come to first and then, and only then, discovered the reasoning to come to that result in an outcome-determinative manner.

Although this might come as a surprise, I do not believe that Chief Justice Roberts engaged in a self-conscious ideological, activist, or outcome-determinative decisionmaking in deciding the workplace dispute in Frommert. Indeed, if asked, I am sure he would sincerely say that the law and the facts could only compel one proper result under employee benefits law in this case.

I want to contend in this Essay that the cultural background of the five conservative Justices simply did not permit them to believe that a company like Xerox would set out to shake down its employees. I, and perhaps Justice Breyer and his colleagues in dissent, are not similarly constrained by that worldview. Of course, I am not free of bias either and have my own worldviews. Indeed, based on my communitarian and egalitarian viewpoints, I helped to pen a law professor amicus brief in support of the pensioners in Frommert. This is how law professor amici for the pensioners read the facts in Frommert:

[Xerox’s] approach in this case is an example par excellence of giving the plan administrator a second bite at the apple. In fact, based on [Xerox’s] theory in this case, they appear to contemplate serial attempts of interpreting the plan until they can convince a court that their interpretation is no longer arbitrary and capricious. Amici believe strongly that such a race-to-the-bottom not only disserves employees like [the Xerox employees] in this case, but is also contrary to the very purposes of ERISA - to protect “employees’ justified expectations of receiving the benefits their employers promise them . . . .

[This case] also takes place against a background where employees who are retired or close to retirement do not have the luxury to wait until the plan administrator finally gets it right. In this case alone, many of the original [Xerox pensioners] have already passed away during the now ten years of this litigation.

As labor law scholars from a generation past aptly observed, facts matter very much in labor law cases like Frommert. But those scholars posited that judicial perception of facts reflected previously-held values and assumptions rather than record evidence. Yet crucially,

8. See Constitutional Accountability Center, The Roberts Court and Corporations: The Numbers Tell The Story 1, available at http://www.theusconstitution.org/upload/fck/file/File_storage/Chamber%20Win%20Statistics.pdf (last visited June 11, 2010) ( (“[A] cohesive five-Justice majority on the Court has produced victories for the Chamber’s side in 64% of cases overall, and 71% of closely divided cases . . . . The data support the proposition that there is a strong ideological component to the Justices’ rulings in business cases, with the Court’s conservatives tilting more decisively toward the Chamber’s position than the Court’s remaining justices tilt in the other direction.”). See also Mencimer, supra note x.
those scholars failed to describe the mechanism by which judges’ values came to shape facts in labor cases.

In this essay, I describe this mechanism by which values influence decisionmaking in labor law cases. Psychological realism in labor law explains that judges in labor cases are generally not self-conscious partisans. Most judges, most of the time, seek to arrive at the right decision without being ideologically committed to any prior legal or political view. Yet values very much matter. Psychological realism contends that judges cannot help but to act based on their culturally-informed perceptions of legally consequential facts. They are human beings like everyone else who psychology forces them to perceive the facts of a case in a certain way.

So, what appears to be an “honest mistake” by Xerox to Chief Justice Roberts and his fellow conservative justices in Frommert seemed equally clear to the law professor amici to be a purposeful strategy on Xerox’s part to defraud the pensioners of their retirement income. In fact, I maintain that these different interpretations of Xerox’s actions towards its pensioners show precisely how psychology operates in a complicated ERISA case.

I want to also contend that labor and employment law in this regard is a special case. Disagreements over legally-consequential facts are especially prevalent. History has shown that judicial and administrative decisionmakers naturally align themselves, based on their worldviews, with employer or employee interests. Indeed, current administrative law practice prescribes how many Democrats and Republicans sit on the National Labor Relations Board (NLRB or Board) during any given period. This state of affairs is not because most Board members are incapable of putting aside their ideologically differences for the betterment of industrial relations in this country; I have argued in a previous empirical study that most of the time they do. Rather, NLRB Board Members, federal judges, and for that matter any judicial and administrative decisionmaker in the workplace milieu, cannot help but to bring their cultural background to bear in deciding cases involving complex labor issues.

So building on prior work discussing cultural cognition theory in the labor and employment law context, I assert that judges are not generally the ideological partisans that many believe them to be. Rather, they are engaging in a much more insidious and subconscious process that I refer to here as “psychological realism in labor law.” Psychological realism in labor law explains that decisionmakers, whether at the judicial or administrative level, act based on culturally-informed perceptions of legally consequential facts. Psychological realism teaches that psychology is the most important factor to the judging enterprise than ideology or morals.

Psychological realism also provides important clues to how we might use this new understanding of judicial decisionmaking in labor cases to structure a more just and inclusive decisionmaking process. Because I maintain that better informed decisionmakers are more self-aware of their cognitive illiberalism, and to some degree can overcome it, I suggest the creation of specialized, federal labor law courts. I also believe that because of the increased complexity of labor and employment law practice, much like as in bankruptcy law, Congress should establish Article I labor courts to deal with these increasingly prominent issues on the federal judicial docket. To see how such a court might operate, I consider the use of labor courts in other countries, and in particular in Chile, where labor courts have been successful in providing a more consistent approach to labor disputes.

Although I am not, for sure, the first person to suggest the creation of such courts for labor cases, I am the first to argue that the existence of psychological realism makes the creation of such courts a necessity to deal with the complex and factually-sensitive area of labor and employment law. This essay is divided into four parts. Part II discusses in detail the Frommert case, seeking to highlight where the majority and dissenting Justices engage in psychological realism. Part III discusses both prior scholarship addressing the impact of decisionmaker values on labor and employment law cases and explains how cultural cognition theory for the first time provides a description of the mechanism by which decisionmaker values lead to radically different interpretation of legally consequential facts. Finally, Part IV concludes that specialized Article labor courts would minimize the use illegitimate cultural bias in these cases and analyzes the Chilean system of labor courts as a possible model to emulate. In all, this essay hopes to set forth an understanding of labor and employment law decisionmaking that leads to the creation of new institutions with the ability to provide some consistency and stability to labor and employment law cases.