
# Labor & Employment Issues
# In Focus
Pitta LLP
For Clients and Friends
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## NLRB INVITES EMPLOYERS TO POST "NO UNION ALLOWED" IN PUBLIC PLACES

On June 14, 2019, the National Labor Relations Board ("NLRB" or "Board") issued its decision in UPMC, involving nonemployee union organizer access to an employer's premises that are also open to the public. 368 NLRB No. 2. In a 3-1 decision, the Republican majority continued its trend of overruling decades of Board precedent in order to fashion a more restrictive analysis for union access to the employer's premises. Dissenting Member McFerran authored a vigorous dissent inviting appellate court reversal.

On February 21, 2013, two SEIU representatives entered a University of Pittsburgh Medical Center ("UPMC") public cafeteria. The representatives sat at two tables, ate lunch, and discussed union organizational matters with off-duty employees. Union flyers and pins were displayed at the tables. UPMC manager Gerald Moran received reports that nonemployees were soliciting in the cafeteria and told the representatives they had to leave because the cafeteria was only for the use of patients, their families and visitors, and employees. Moran did not ask another woman present in the cafeteria to leave who did not fall into these categories. Moran ultimately had the police remove the SEIU representatives. A non-posted hospital rule stated that "Non-staff members may not solicit, distribute or post material at any times on UPMC premises." On two prior occasions, UPMC enforced the rule to remove individuals engaged in solicitation.

The Board all Republican majority, consisting of Chairman Ring and Members Kaplan and Emanuel, concluded that UPMC did not violate the law by ejecting the SEIU organizers. The Board, relying on the Supreme Court's decision in *NLRB v. Babcock & Wilcox*, explained that there are two exceptions to the general rule that an employer may deny access to its property by nonemployee union organizers: inaccessibility and discrimination. The majority concluded that Board precedent unlawfully authorized an additional "public space" exception for employer property that is open to the public when organizers use the facility in a manner consistent with its intended use and are not disruptive. The Board overruled this purported third exception. Perhaps recognizing that more recent Board and court decisions have relied on the discrimination exception to find similar union ejections unlawful, the Board majority divined a new definition for discrimination: "disparate treatment where by rule or practice a property owner bars access by nonemployee union representatives seeking to engage in certain activity while permitting similar activity in similar relevant circumstances by other employees." (emphasis added). The Board concluded that UPMC had a "practice" of removing nonemployees engaged in promotional activities, including solicitation and distribution, and therefore found no discrimination here.

Member McFerran dissented, chastising the majority for reversing precedent that it misread and conjuring a factual situation for which there is no evidence. McFerran agreed with the majority that Babcock mandated the two exceptions as exclusive. She criticized the majority, however, for going beyond this "largely academic" issue to overrule cases relying on the discrimination exception. In particular, McFerran found that the majority's definition of

discrimination had "no clear origin in Board case law" and is impermissibly narrow, inconsistent with the only Supreme Court case on point, which reflected a broad understanding that mere opposition to statutorily-protected activity cannot be a legitimate reason for exercising a property owner's right to exclude an unwelcome person. McFerran then admonished the majority for its interpretation of the facts. She accused the majority of adopting a post-hoc categorization of the union activity as "promotional," given that Moran expressly based removal of the organizers on their identity. Moreover, McFerran expressed that UPMC's prior ejections were distinguishable as responsive to individuals soliciting money, rather than mere conversations over lunch. McFerran argued that nothing distinguished the union representatives' conduct from any other nonemployee patron of the cafeteria except the union-related content of their conversations. She remarked that "if this was not discrimination, then it is hard to know what is." She additionally observed that "the unstated premise of the majority's position seems to be that the mere presence of the union representatives in the cafeteria . . . per se constitutes promotional activity." Accordingly, McFerran found the Board holding tantamount to inviting employers to post a "No Union Representatives Allowed" sign. McFerran cautioned that the Board was previously reversed in 2000 by the D.C. Circuit for overruling this same line of precedent because it lacked the proper factual predicate for doing so, and concluded that the same result is warranted here.

## JUDGE BALKS AT UMPIRE'S CLAIM OF UNION PRIVILEGE

In July of 2017, Umpire Angel Hernandez brought a lawsuit against Major League Baseball ("MLB") in the Southern District of Ohio. The case was subsequently transferred to the Southern District of New York, and Hernandez filed an Amended Complaint on November 27, 2018, alleging race, color, and national origin discrimination under various statutes because he was passed over for World Series assignments and promotions. *Hernandez v. The Office of the Commissioner of Baseball et al*., 18-cv-9035 (S.D.N.Y.). Most recently, this case has drawn particular attention because of a discovery dispute over the confidentiality of communications between unions and employees. After pitches from both sides, the Judge threw out the claim of a "union relations privilege."

On May 23, 2019, MLB submitted a letter to Chief Magistrate Judge Gabriel W. Gorenstein requesting a conference or order for the purpose of requiring Hernandez to provide testimony and documents concerning his communications with his union, the Major League Baseball Umpires Association ("MLBUA" or "Union"). At Hernandez's deposition, his counsel instructed him not to answer certain questions including: whether he communicated with Union officials about filing a grievance, the substance of communications Hernandez had with the Union about his performance evaluations, and whether Hernandez made any claims to the Union with respect to the alleged discrimination. MLB explained that Hernandez alleged a "union relations privilege," which it argued does not exist. MLB relied primarily on a 1998 federal district court decision declining to recognize a union privilege and specifically noting New York's failed legislative efforts to codify the same. *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332 (E.D.N.Y. 1998). MLB argued that the terms and conditions of Hernandez's employment were central to his claims and therefore communications with his Union, which is responsible for negotiation of those terms, are indisputably relevant and failure to provide them would be prejudicial.

Plaintiff's attorneys responded on May 28, contending that two earlier New York State court cases support finding a union relations privilege. *City of Newburgh v. Newman*, 421 N.Y.S.2d 673, 674 (3d Dep't 1979); *Seelig v. Shepard*, 578 N.Y.S.2d 965, 967 (Sup. Ct. 1991). Plaintiff also distinguished In re Grand Jury Subpoenas, arguing that it did not involve an employer seeking production of union communications, like MLB is here. Additionally, Plaintiff argued that the principles applied in determining whether a privilege should exist weigh in favor of finding one for communications between unions and the employees they represent. Quoting an Illinois district court in 2011, Plaintiff explained that "without confidentiality, union members would be hesitant to be fully forthcoming with their representatives, detrimentally impacting a union representative's ability to advise and represent union members with questions or problems*." Bell v. Vill. of Streamwood*, 806 F. Supp. 2d 1052, 1056 (N.D. Ill. 2011) (recognizing a union relations privilege as codified by state statute).

On June 12, 2019, Magistrate Judge Gorenstein held a discovery hearing and, following oral argument, granted MLB's motion to compel production, without issuance of a published, written decision explaining his reasoning. Accordingly, it is far from clear that a union relations privilege could be relied upon in New York federal courts. Like Illinois, New York may need to codify such a privilege if it wishes to protect union-employee communications.

## GETTING WRIGHT LINE RIGHT

Two decisions of the current National Labor Relations Board ("NLRB" or "Board"), both issued on May 23, 2019, show the evolution from the Obama era application of *Wright Line* analysis to a more employer friendly application in the age of Trump.

The Board uses *Wright Line* analysis in "mixed motive" cases to determine whether an employer's actions were really motivated by anti-union animus even though the employer proffers a legitimate reason. First, the General Counsel must show, by a preponderance of the evidence, that protected union activity was "a factor" in the employer's decision. Second, the burden then shifts to the employer to show that it would have taken the same action even absent the protected activity.

In *McPc, Inc*. NLRB No 06-CA-06390 (5/23/19), the previous Obama era Board had found that the employer unlawfully discharged an employee for stating at a meeting that an executive's $400,000 pay could be better used to hire more employees and reduce excessive workloads. The Third Circuit Court of Appeals remanded the case for *Wright Line* analysis, since the employer claimed various legitimate reasons – improper access to confidential information and then dishonesty in answering how he knew the confidential current salary. On remand, the current Republican appointees Chairman Ring and Member Kaplan, joined by Democratic appointee Member McFerran, applied *Wright Line* to agree with the Obama Board. The Board noted *McPc's* shifting reasons, deeming them pretextual, and adding: "where the record demonstrates that the employer's proffered reasons are pretextual – that is, false or in fact not relied upon, the employer fails by definition . . . *and thus there is no need to perform the second part of the Wright Line analysis*." ("Emphasis added).

However, in *Electrolux Home Products, Inc*. NLRB No. 15-CA-206187 (5/23/19), all Republican appointees Chairman Ring and Members Kaplan and Emanuel took a different tack. Employee J'vada Mason actively supported the union's organizing drive. At the end of the

captive audience meeting before a re-run election, Mason stood up and challenged the employer's statements. She was told to shut up. Seven months later, Electrolux discharged Mason for alleged insubordination. The Board agreed that Electrolux treated other employees more leniently for similar violations so that the employer's stated reason could be pretextual. However, "*it is inaccurate to state, as a general matter that once a finding is made [of pretext]...the analysis of the employer's motivation is at an end*," cautioned the Board. "Rather, *the record as a whole* must indicate that the real reason for the discharge was the alleged discriminatee's union or protected concerted activities." ("Emphasis added) Applying this *Wright Line* approach, the Board concluded that the "whole record" showed no animus given the seven months between the meeting and discharge and the employer's record of good faith bargaining after the union was certified.

## NEW JERSEY: FIRST STATE IN NATION TO REQUIRE PANIC BUTTONS TO PROTECT HOTEL WORKERS FROM HARASSMENT

From Jersey City to Atlantic City, thousands of hotel workers in New Jersey will now be equipped with "panic buttons" for their protection against inappropriate conduct by guests. On June 12, 2019, New Jersey Governor Phil Murphy signed legislation requiring all hotels in the Garden State with more than 100 rooms to provide the wearable safety device to housekeepers, which will allow them to immediately alert security personnel if they feel they are in danger or a compromising position while performing duties. The law takes effect in January. Penalties for violating the Panic Button Legislation, which includes not only failing to provide the devices, but also failing to notify hotel guests about the devices, begin with a $5,000 fine and could reach double that for every subsequent violation.

The harassment of hotel workers, especially housekeepers, has been a longstanding issue the hotel industry has struggled to address. Some hotel chains including Marriott and Hilton have recently announced plans to equip workers with the wearable devices even without the legislative mandate. Although New Jersey is the first state in the country to enact statewide legislation that requires hotels to provide certain employees with these safety devices, similar legislation is being considered in Illinois, Florida and Washington State. Indeed, similar legislation has already taken effect in Chicago and local ordinances have been approved in Miami Beach, Florida, Sacramento and Long Beach (California).

The California municipal legislation goes much further, though. The Sacramento legislation requires every hotel to develop, maintain, and comply with a written sexual harassment policy to protect employees against sexual assault and harassment by guests. The Long Beach legislation requires hotels of any size to issue panic buttons to employees. The Long Beach ordinance also prohibits employers from retaliating against employees who decide to use their panic buttons. Aside from the local legislative measures, "panic button" obligations have made their way into several collective bargaining agreements across the country, including those in New York and Hawaii.

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