Labor & Employment Issues
In Focus
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For Clients and Friends
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SUPREME COURT LIMITS A PROCEDURAL DEFENSE AVAILABLE TO EMPLOYERS IN JOB DISCRIMINATION LAWSUITS

On Monday, June 3, 2019 the Supreme Court unanimously issued a decision which answers conclusively that pre-filing administrative exhaustion is non-jurisdictional and subject to waiver. *Fort Bend County, Texas v. Davis,* 587 U.S. ____ (2019).

In Ft. Bend County, Texas, Lois Davis filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment and retaliation by Fort Bend County, her employer. While Ms. Davis' charge was pending, she was fired, allegedly for going to a church event instead of working as scheduled on a Sunday. Ms. Davis never formally amended her EEOC charge to allege religious discrimination in addition to her other theories, but sued on that basis nonetheless (among others) after receiving a notice of right to sue from the EEOC. Apparently, Ms. Davis wrote the word "religion" in the margin of a form supplementing a retaliation and sex bias charge she had filed with Texas' EEOC equivalent, which Fort Bend argued was not a valid charge.

Several years into the litigation, the County realized that Ms. Davis had never exhausted her administrative remedies with respect to her religious discrimination claim and moved to dismiss the lawsuit, claiming that the district court lacked jurisdiction to adjudicate Ms. Davis's case. The district court agreed and dismissed Ms. Davis's lawsuit. The Fifth Circuit reversed and reinstated the suit finding Title VII's charge-filing requirement a prudential, but not jurisdictional, prerequisite to suit, and the employer's failure to promptly raise an objection to constitute a waiver of its objection.

The Supreme Court affirmed the Fifth Circuit's decision. Justice Ginsburg explained, "we hold that Title VII's charge-filing instruction is not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction)." Justice Ginsburg described Title VII's charge requirement as a "claim-processing rule," and that courts should treat litigation prerequisites as jurisdictional only if Congress "clearly states" that they are. She dismissed Title VII's charge filing instruction as being "not of that character," and "properly ranked among the array of claim-processing rules that must be timely raised to come into play." Therefore, although EEOC charge-filing is still a mandatory prerequisite to filing suit and remains a procedural step that a court must enforce if the issue is timely raised, tardiness on the part of employers to object to a claimant's exhaustion efforts may result in a waiver of any such argument.

The ruling puts the onus on employers to promptly raise their objections to toss lawsuits brought under Title VII of the 1964 Civil Rights Act on that procedural ground, but it does not remove a worker's obligation to file administrative claims before going to court. As Justice Ginsburg wrote: "A Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive defense,"

RATS, CATS, AND SNAKES

As discussed in prior issues of *In Focus*, National Labor Relations Board ("NLRB" or "Board") General Counsel Peter Robb has made it a priority to exterminate Scabby the Rat. To this end, he has demanded that NLRB regional offices issue complaints alleging violation of Section 8(b)(4) of the National Labor Relations Act for use of inflatables or banners when displayed at neutral employer facilities. Further, he has pursued injunctions in federal court under Section 10(l) seeking preliminary relief. In an Advice Memo released on May 14, 2019, the General Counsel's Office detailed its arguments for overturning three earlier Board decisions that protected Scabby.

The Division of Advice's Memo addressed IBEW Local 134's alleged use of a "large, stationary banner proclaiming a labor dispute with the general contractor, as well as a large, inflatable cat clutching a construction worker by the neck, near the entrance to a construction site." The Memo concluded that Region 13 should issue a complaint in order to reconsider decisions in *Eliason & Kruth of Arizona*, 355 NLRB 797 (2010); *Brandon Medical Center*, 356 NLRB 1290 (2011); and *New Star*, 356 NLRB 613 (2011). Before a complaint was issued, Local 134 and the employer reached a settlement. Nevertheless, the General Counsel's arguments permeate NLRB proceedings and federal court litigation. A prominent example is *Donegal Services*, which is briefed and awaiting a decision from an Administrative Law Judge. 13-CP-227526. In that case, Region 13 is currently seeking preliminary relief in federal court pursuant to Section 10(l). *Ohr v. IUOE Local 150*, 18-cv-8414 (N.D. Ill.). Even more advanced, last week an ALJ issued a decision rejecting these arguments, concluding he was bound to apply existing law. *IBEW Local 98*, 04-CC-223346 (May 28, 2019). It's plausible this case could serve as the vehicle for Board reconsideration.

The Memo sets forth three arguments that regions should present. First, regions should contend that erection of a large "misleading" banner as well as use of a large inflatable cat clutching a construction worker by the neck is tantamount to unlawful secondary picketing. The Memo acknowledges that the Supreme Court held handbilling at a neutral employer's business lawful, as distinguished from picketing activities that are coercive. The General Counsel argues that large banners and inflatables seek to dissuade the public from entering through coercive conduct, rather than through a persuasive message, and therefore are tantamount to picketing rather than handbilling. The Memo argues that *Eliason*, *Brandon*, and *New Star* must be reconsidered as inconsistent with Board precedent providing a broad and flexible definition of picketing.

Regions are next directed to argue that posting of banners and inflatables constitute unlawful signal picketing. The General Counsel contends that activity which falls short of traditional picketing may still send a signal to a neutral's employees that they should withhold services. The Memo cites to a dissent by Member Hayes in *Brandon*, concluding that the union's use of a rat balloon was a signal to third parties of an invisible picket line they should not cross given its frequent use in labor disputes.

Finally, Regions are directed to argue that even if this conduct is not tantamount to picketing, it is unlawful under Section 8(b)(4) and not shielded by the First Amendment because unions are engaged in "labor and/or commercial speech" entitled to less constitutional protection. The Memo compares posting a "large, misleading banner and the intimidating, violent cat strangling a construction worker" to the following examples of unlawful conduct:

"broadcasting a message at extremely high volumes through loudspeakers," throwing bags full of trash into a building's lobby," and "massed marching without signs." The Memo waves away First Amendment concern because the "Government has a heightened interest in regulating labor speech because of its direct effect on interstate commerce." Finally, the Memo argues against application of the First Amendment because a banner identifying a labor dispute that does not precisely define the contours of said dispute is false speech undeserving of protection.

This line of attack on fairly benign union activity is especially vexing considering conservatives' expansion of the First Amendment for use as a sword against unions, most notably in the Supreme Court's decision in *Janus v. AFSCME Council 31*. Notably, this contradiction was not lost on IUOE Local 150, which filed a counterclaim in opposition to Region 13's 10(l) petition, contending that the Board deprived or is attempting to deprive Local 150 of its ability to communicate its labor dispute in violation of, among other things, the First Amendment. The Illinois district court dismissed Local 150's counterclaim for lack of jurisdiction, concluding that such a claim would have to be made to the Seventh Circuit on appeal of a Board decision. Given the composition of the Board, we may well see such an appeal in the near future, setting up a test of consistency on First Amendment jurisprudence.

RING AND KAPLAN RIDE TO RESCUE OF THREATENING EMPLOYER; MCFERRAN DISSENTS

In another example of the Republican majority of the National Labor Relations Board's ("NLRB" or "Board") aggressive tilting of the scales of justice in favor of employers, Chairman Ring and Member Kaplan vacated a union rerun election victory and reinstated a prior narrow election loss in its place on the ground that the acknowledged employers' misstatements of law did not rise to threats requiring the second election. *Didlake, Inc*. NLRB 05-RC-179494 (5/10/19).

Didlake provides janitorial and floor tech workers whom an affiliate of the Laborers' International Union of North America ("LIUNA") attempted to organize. On the day before the election, Didlake's Vice President addressed the 20 workers, 15 of whom are severely disabled. He said:

> So if the Union wins, I want to let you know a few things that will probably happen, okay, because we have the same Union at the Pentagon. . . First thing they will require you to do is join the Union. And if you don't, you will not be able to work here. . . . then we will take $37 a month out of your paycheck, and we will give it to the Union . . . If they win, you have to join as a condition of your employment to be here, and you will be paying the Union dues. Those are the three things that we know for sure. All the other things will become negotiations.

LIUNA lost the election by one vote. However, the NLRB Regional Director ruled Didlake's statements a threat and ordered a second election which the Union won 12:6.

Enter Ring and Kaplan, reversing the Regional Director. Starting with the black letter rule that mere misstatements of law by a union or employer will not usually invalidate an election, they found no reason to depart from that rule. Objections must be evaluated in context, they

reasoned, and here, "the Employer discussed in a straightforward manner a variety of issues" with "no allegations or evidence that the Employer acted in a deceptive manner." Moreover, the false statements that union membership and dues would be required were based on Didlake's experience at the Pentagon, so the majority saw more fact than threat. Accordingly, Ring and Kaplan overruled the Union's objections to the first election and certified its resulting narrow LIUNA loss, wiping out the subsequent overwhelming Union win.

Sole Democratic Member McFerran sided strongly with the Regional Director who "correctly found that the Employer's statements threatened employees that if they chose the Union, the Employer certainly would require them to join the Union and pay dues or be fired." McFerran analyzed the cases of mere errors of law as the employer misstating law but posing future facts as indefinite, using "if" or "may." "Here," she noted, "an adverse consequence for employees, imposed by the employer, was presented as the certain result of choosing the union." "Tellingly," she added, "the Employer contrasted the certainty of this adverse consequence with the uncertainty that the Union could win positive changes" in wages, benefits and work rules. McFerran's biting last jab sounds a warning for unions: "any unlawful threat can be dressed-up –*whether by the employer at the time or by the Board afterwards* – as a misstatement of law" (emphasis added). Look for employer counsel to continue pushing the boundaries, secure in this and other examples that the agency tasked to protect employee collective rights will never infer an unlawful employer motive as those rights are denied.

NLRB'S GENERAL COUNSEL'S ADVICE MEMO: UBER DRIVERS CANNOT UNIONIZE

On March 14, 2019, the National Labor Relations Board's ("Board") General Counsel Peter Robb ("GC") issued an Advice Memo in which he decided that because Uber drivers are independent contractors they are ineligible to unionize. GC memoranda are issued to field offices and/or Washington offices by the GC to provide policy guidance. The Memo is in line with previous Trump-era Board decisions declaring that gig (meaning temporary work engagement) economy workers are not "employees" under federal workplace law. The Memo will guide the regional officials that process workers' bids to form or join unions and their unfair labor practice charges against businesses.

The GC applied what is called the *Super Shuttle* classification test, which was originally laid out in a January Board decision dismissing an organizing bid by van operators at Dallas-Fort Worth International Airport. The test aims to gauge workers' entrepreneurial opportunity — their ability to influence their pay — by examining 10 facets of their relationship to their alleged employer.

In the Memo, the GC cited the autonomy afforded to drivers as a key component. Specifically addressing that on any given day, Uber drivers have the autonomy to decide how best to serve their own economic motivations, such as, fulfilling ride requests via the Uber app, fulfilling ride requests via a competing ride-sharing service, or perhaps pursuing an entirely different venture altogether. Drivers are free to set their own schedules simply by logging on and off the app. Drivers control their own work area based on where they choose to log into the app as well. The GC found that neither Uber's loosely imposed service standards nor the fact that it takes a portion of drivers' ride fares was enough to support employee status. According

to the GC, both factors were overwhelmed by the weight of the above mentioned factors pointing toward independent contractor status.

Critics of the GC's Memo have complained that like other recent GC memos and Board decisions concerning the gig economy, the results seem to be outcome driven rather than a true analysis of the factors weighing employee status vs. independent contractor status.

FARMERS' RIGHTS TO ORGANIZE SPROUT INTO FRUITION

On May 23, 2019, the New York State Supreme Court, Appellate Division, Third Judicial Department, issued a trailblazing decision in *Hernandez v New York,* No. 526866, 2019 N.Y. Slip Op. 04065, 2019 WL 2219066 (N.Y.A.D. 3 Dept., May 23, 2019), granting farmworkers union organizing and collective bargaining rights. Agricultural laborers have traditionally been excluded from the protections of the National Labor Relations Act ("NLRA"), and until last week, they were also excluded from the protections of the New York State Employee Relations Act ("SERA"), which was passed in 1937. In a 4-to-1 ruling, the Appellate Division reversed a lower court and said SERA's farm worker exclusion was "unconstitutional as a matter of law." *Id*. at 10.

In 2016, a group of farm workers claimed they were fired by a dairy farm for trying to organize in pursuit of better working conditions. The workers then sued the State alleging that SERA's farm laborer exclusion from the definition of "employee" violated a State constitutional provision guaranteeing "employees" the right to organize and collectively bargain. NY Constitution, Article I, § 17. When both Governor Andrew Cuomo and the State Attorney General declined to defend the suit, the New York Farm Bureau, Inc., the state's largest agricultural employer advocacy group, intervened and successfully defended the farm laborer exclusion at the trial court level. On appeal, applying the traditional cannons of statutory interpretation, the Appellate Division explained that "there is nothing in the language of [NY Constitution, Article I, § 17] to support the suggestion that the drafters intended for the term 'employees' to be narrowed or limited in any way."

Removing the farm labor exclusion was part of the workers' ongoing efforts to organize the State's agricultural growers and dairy farmers. The court's ruling provides more ammunition for the State legislature to pass the Farmworkers Fair Labor Practices Act, which would codify those collective bargaining protections and include protections for overtime pay, guarantee a day off as well as other mandatory employee benefits to farmworkers. Although the bill has been introduced repeatedly over the past two decades and has never passed, after the Democratic takeover of the State Senate, three Senate hearings were recently held to discuss the proposed measure. If it passes or if the court opinion withstands appeal, not only would State farm workers enjoy the right to organize, bargain, and strike, but it may set the stage for other states to follow suit.

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