Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
March 27, 2019 Edition

JANUS II REBUFFED - UNION NOT LIABLE FOR PRE-JANUS I DAMAGES

As discussed in past issues of In Focus, a consequence of the Supreme Court's decision in *Janus v. AFSCME Council 31* is the proliferation of lawsuits across the country seeking to recover fair share fees collected prior to the high court's decision. The Supreme Court in *Janus* remanded this issue to the Northern District of Illinois. On March 18, 2019, District Court Judge Robert Gettleman issued a decision, holding that the union acted in "good-faith" and therefore was not liable for retroactive damages. 15-cv-1235 (N.D. Il.).

The Supreme Court in *Janus* held that the First Amendment prohibits public sector unions from collecting fair share fees from nonconsenting employees. Plaintiff Mark Janus, now a senior fellow with the conservative think tank that supported his lawsuit, now argued that he should be awarded damages in the amount of the fair share fees he paid *prior to* the Supreme Court's decision. AFSCME defended its past collection of fees, claiming that it should not be responsible when it had simply relied on the 1977 Supreme Court decision in *Abood v. Detroit Board of Education*.

Judge Gettleman agreed with AFSCME, concluding that the statute providing Janus with a cause of action permits an affirmative defense of "good-faith" for private parties. The Supreme Court historically permitted a similar defense to state officials, but expressly left open whether private parties, like unions, could utilize it. Judge Gettleman noted that every federal court to address this matter has concluded that private parties may raise a good faith defense and, despite urging from Janus, he found no reason to depart here. Janus, interpreting the Supreme Court's public sector precedent, alternatively argued that the good faith defense did not apply because state of mind was not an element of the union's constitutional violation. Judge Gettleman again disagreed, concluding that the pertinent inquiry is not the nature of a particular statute, but rather whether the union knew or should have known that the Illinois Public Relations Act's fair share provision was unconstitutional.

Recognizing the defense's viability, the Court considered whether the union acted in good faith. Judge Gettleman noted that immediately after the decision was issued the union stopped collecting fair-share fees. Further, the Judge explained that despite supposed notice that *Abood* stood on shaky grounds, "there was no way for [the union] to predict the resolution of this case. Indeed, had the general and/or presidential election resulted differently, the composition of the Supreme Court that decided the case may well have been different, leading to a different result." Consequently, the Court held that the good faith defense applied and Mark Janus was not entitled to any damages.

The Illinois district court's decision in *Janus II* joins several other federal courts in dismissing claims for retroactive fair share fees reimbursement. *Crockett v. NEA-Alaska*, 18-cv-179 (D. Alaska Mar. 14, 2019); *Carey v. Inslee*, 18-cv-5208 (W.D. Wash. Mar. 11, 2019); *Cook v. Brown*, 18-cv-1085 (D. Or. Feb. 28, 2019); *Danielson v. Inslee*, 18-cv-05206 (W.D. Wa. Nov. 28, 2018). However, to many in the labor movement, this decision is especially satisfying.

NEW JERSEY ENACTS NEW PAID FAMILY LEAVE LAW

As promised in his 2017 election campaign, New Jersey Governor Phil Murphy on February 19, 2019 signed a significant expansion of the state's leave laws, permitting new categories of leave and expanding available state-provided, income-replacement benefits.

Under the amendments, effective June 30, 2019, the New Jersey Family Leave Act now requires employers with 30 or more employees (down from 50) to provide their New Jersey employees with 12 weeks of job-protected leave in a 24-month period to care for a family member (parent, parent-in-law, minor or disabled child, spouse, or civil union partner) with a serious health condition, or to bond with a newly born or adopted child.
In addition, effective immediately, employers must permit employees to take leave for the following additional reasons:

To care for any child age 18 or older, a sibling, grandparent, grandchild, domestic partner, foster parent, any individual related by blood, or any other individual with a close association equivalent to a family relationship;

- For bonding with a newborn child conceived through a gestational carrier agreement, or with a newly placed foster child;
- For bonding on an intermittent basis (weeks or days) without employer consent;
- In full-day increments (reduced leave) over a period of 12 consecutive months (up from 24 consecutive weeks); and
- On only 15 days of advance notice for intermittent bonding leave (employees must continue to provide 30 days advance notice for continuous bonding leave).

In addition, the New Jersey Security and Financial Empowerment Act (NJ SAFE Act) applies to employers with 25 or more employees and grants an employee 20 days of leave in a 12-month period if the employee, or the employee's family member, including a child (under 19 or of any age incapable of self-care), parent, spouse, domestic partner, or civil union partner, has been the victim of domestic violence or a sexually violent offense. Under the amended act:

- Eligible family members now include a parent-in-law, sibling, grandparent, grandchild, any individual related by blood or any other individual with a close association equivalent of a family relationship;
- Employers may no longer require employees to use accrued paid leave; and
- Employees are now eligible for family leave insurance benefits.

Next, effective July 1, 2020, New Jersey Family Leave Insurance (“NJFLI”) provides New Jersey workers with twelve weeks (up from six) of pay at two-thirds their normal rate up to $860 weekly for up to 8 weeks benefits to bond with a newborn or newly adopted child or to provide care for a seriously ill or injured family member. Effective immediately:

- Benefits are available for leave to care for a child regardless of age, a child conceived through a gestational carrier agreement, sibling, grandparent, grandchild, parent-in-

law, foster parent, any individual related by blood, or any other individual with a close association equivalent to a family relationship. (Previously, benefits were limited to a child under 19 or incapable of self-care, spouse, domestic partner, civil union partner or parent.);

- Employees taking NJ SAFE Leave Act are eligible for NJFLI Benefits;

- Employers may no longer require employees to use two weeks of paid time off in lieu of two weeks of NJFLI. Employees may elect to use their available PTO in addition to their NJFLI benefits;

- Employees now have to provide only 15 days of advance notice when requesting intermittent bonding leave. Employees must continue to provide 30 days of advance notice for continuous bonding leave; and

- Employers are prohibited from discharging, harassing, threatening, discriminating or retaliating against an employee with respect to the compensation, terms, conditions or other privileges of employment, including reinstatement, because the employee took or requested NJFLI.

New Jersey will now be requiring perhaps the most generous benefits in the country. Moreover, the new benefits are coming online with short notice. As such, employers must promptly update their policies and practices to ensure compliance.

NLRB VEERS HARD RIGHT IN APPLYING LAW TO CURTAIL UNION EFFECTIVENESS

Two recent decisions of the U.S. National Labor Relations Board (" NLRB" or " Board") illustrate the hard right tack taken by the three member Republican majority, over the sole Democrat' s dissent, applying existing law to enhance employer authority in areas of traditional union vigor. *PAE Applied Technologies*, 28-CA-170331 (Mar. 8, 2019) (*Weingarten* meeting); *Audio Visual Services Group d/b/a PSAV Presentation Services*, 19-CA-186007 (Mar. 12, 2019) (threats in bargaining).

Limiting Union Participation in Weingarten Disciplinary Interviews

In *PAE Applied Technologies*, the independent contractor Employer provided security at a U.S. Air Force base. When the Employer moved to discipline two security officers based on Air Force complaints, Union President John Poulos confronted Employer and Air Force representatives at a meeting and allegedly insulted one Air Force speaker. The Employer then moved to discipline Poulos for being rude and offensive to a customer. At Poulos' *Weingarten* meeting, Employer, Air Force and Union representatives clashed immediately and so the Employer chair of the meeting established an order of statements for each party and required that all statements, questions and responses be submitted to him in writing which he would then read. Union representatives could not speak or even confer with Poulos until after his statement had been written by him, read by the chair and he responded to questions.

Board Chairman Ring and Member Emanuel found no unlawful interference with Poulos' Weingarten rights, overturning the ALJ. They noted that the Employer' s chair applied the rule to all parties equally, which distinguished the case from those where only the union is restricted;

that the rule appeared legitimately necessary to avoid chaos; and that the Union's representatives did eventually participate after Poulos' statement and questions and answers. In dissent Member McFarren objected that *Weingarte*n protects the employee' s right to effective assistance which the Employer unlawfully abridged during the critical points when Poulos wrote his statement and answered Employer questions. On the bright side, all Board Members agreed the Employer committed unfair labor practices by promulgating discipline and rules concerning customer contact without first bargaining with the Union, and in denying Poulos representation by Union counsel (not his personal attorney) at his *Weingarten* interview.

Threats of Futility During Collective Bargaining

In *Audio Visual Services Group*, the national Employer and Seattle based IATSE Local 15 both engaged in hard bargaining on their first contract and both parties cancelled bargaining sessions, resulting in a four month delay in meeting at all, though no party claimed meetings were useless. In response to a Union request for information, the Employer denied certain production. One day after their long delayed bargaining session, the Union filed refusal to bargain unfair labor practice charges.

Chairman Ring and Member Emanuel again reversed the ALJ finding of unlawful refusal to bargain. They noted both sides negotiated hard and delayed meetings, that the Employer refused to provide information in good faith though ultimately wrong in part, and that they would not rely on "away from the bargaining table" Employer conduct which the ALJ and dissenting Member McFarren found important. That conduct, by the Employer's CEO, consisted of the CEO's statements to a Philadelphia unit before an NLRB election, at an Employer required pre-election meeting, that the Seattle negotiations were at a stalemate and if the Philadelphia unit was represented by their union, things "could very well go the same way in Philadelphia, as far as dragging out and nothing happening" since the Employer did not have to agree to Union proposals. Combined with the Employer' s delays and refusal to provide information, the ALJ and Member McFarren deemed the CEO' s statement indicative of Employer intent to avoid an agreement in Seattle in order to defeat unionization in Philadelphia.

Analysis

Unlike big name rule changing cases, *PAE* and *Applied Technologies* illustrate how the current Board reaches decisions favoring employers within existing law. In both cases the Republican majority refused to infer an unlawful motive in suspect employer conduct even in the context of undisputed accompanying unfair labor practices. Broader still, these cases offer anti-union employers a roadmap to curtail union *Weingarten* and bargaining/election rights. Whether these cases remain limited to their facts, or become stepping stones to more extreme pro-employer decisions, will be seen during the years ahead.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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