Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
May 17, 2019 Edition

WORKERS WIN TWO WHEN U. S. SUPREME COURT DENIES REVIEW OF PUBLIC SECTOR FIRST AMENDMENT CASES

On May 13, 2019, the U.S. Supreme Court declined to review two public sector employee cases resulting in Circuit Court wins for the public sector worker surviving.

In *Palardy v. Township of Millburn,* No. 17-2597 (3d Cir. 9/18/18), *cert. denied*, No. 18-830 (5/13/19), the Third Circuit Court of Appeals overruled a District Court's decision which had dismissed the complaint of the plaintiff, a former police officer in the Township of Millburn, New Jersey, who had alleged that he had unlawfully been denied a promotion to Chief of Police because the Township's business administrator, who had sole authority to make such appointments, opposed Palardy's union membership and activity.

The complaint alleged that Palardy was active in police officers' unions and had been an officer of the Patrolmen's Benevolent Association and the President of the Superior Officers' Association, participating in contract negotiations with the Township, and attending disciplinary hearings for members. He alleged that the business administrator had repeatedly made statements reflecting negatively on Palardy's union activities, including that he would never become chief because of his union affiliation and "being a thorn in my side for all these years." Eventually after being passed over for promotion, Palardy stepped down as Union President, but still did not obtain the promotion to Chief. He alleged that he "saw the writing on the wall," and therefore retired from the police force. He then filed a federal complaint against the Township for violating his First Amendment rights.

The Third Circuit rejected the District Court's analysis which followed free speech case law and concluded that plaintiff's union membership was not "protected conduct" under First Amendment analysis because the plaintiff had not alleged that he had spoken out as a private citizen on a matter of public concern. The Circuit Court said that Palardy's claim presented a "pure associational claim" that he was disqualified from becoming Chief because of his union affiliation which should be analyzed separately from free speech claims. The Third Circuit then adopted a standard set by the Fifth Circuit holding that the "public concern requirement" does not apply to associational claims because "union activity of public employees 'is not solely personal and is inevitably of public concern.'" The Third Circuit also cited the Eleventh Circuit decision, *Hatcher v. Bd. of Pub. Educ. & Orphanage,* 809 F.2d 1546, 1558 (1987), which quoted the highly-esteemed U.S. Supreme Court Justice Harlan in *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958): "'it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . [,] state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'"

The Third Circuit recognized that its approach diverged from that adopted by other Circuit Courts, including the Second Circuit in New York, but apparently the U.S. Supreme Court in denying the Township's petition for certiorari did not see any reason at this point to change the Third Circuit's decision favoring the public sector worker's associational rights.

Also on May 13, 2019, the Supreme Court denied review of an appeal from the Eighth Circuit Court of Appeals' decision in *Bierman v. Dayton,* 900 F.3d 570 (8th Cir., 8/14/18), *cert. denied,* No. 18-776 (5/13/19) in which that court affirmed a grant of summary judgment to the State of Minnesota. In that case, parents who provide home healthcare services to their disabled children objected to the state law under which the SEIU was elected as the exclusive representative for Minnesota home healthcare providers. The plaintiffs claimed their First Amendment rights were violated simply by allowing the State to recognize a union which won an election by a majority vote.

The Eighth Circuit affirmed the District Court's dismissal of the complaint on the ground that the plaintiffs' argument was foreclosed by prior U.S. Supreme Court precedent in *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271 (1984). In *Knight,* the Supreme Court rejected the complaint of community college faculty members about Minnesota's recognition of an exclusive representative for negotiations with the faculty, holding that the state law did not in any way restrain the faculty members' "freedom to associate *or not associate* with whom they please…." 465 U.S. at 288.

In *Bierman,* the Eighth Circuit found no meaningful distinction from *Knight,* stating that the Minnesota statute likewise allowed the home healthcare providers to form their own advocacy groups independent of the union and does not require them to join the union. Therefore, in the Circuit's conclusion, there was no impingement on their right not to associate by the State's recognition of an exclusive representative. The Eighth Circuit also indicated that language in the *Janus* decision by the Supreme Court appeared to undermine some of the reasoning in *Knight*, but still concluded that it must apply the precedent which has direct application to the case.

No Circuit Court has disagreed up to this point with the application of *Knight* to the exclusive representation rights of public sector unions. As it has done in the past with other similar cases, the U.S. Supreme Court denied review of *Bierman,* finding no reason at this point to disturb its prior holding in *Knight.*

COURT ENFORCES NLRB ORDER OF PRESCRIBED BARGAINING TIMES AND INFORMATION

A recent memo decision of the U.S. Court of Appeals for the D.C. Circuit shows that certain popular anti-union tactics used by employers to undermine a union despite election certification by the U.S. National Labor Relations Board ("NLRB" or "Board") have their limits. In *Kitsap Tenant Support Services Inc. v. NLRB*, DC Cir. No. 18-1187 (April 30, 2019), Judges Garland, Henderson and Sentelle enforced an NLRB order reinstating union supporters and mandating bargaining by the employer at prescribed times set by the Board or the Union.

Kitsap Tenant Support Services ("Kitsap" or "Employer") provides caregiving services to disabled clients in Washington State. Following a hotly contested election marked by alleged Employer unfair labor practices, the Board certified AFSCME as collective bargaining agent for Kitsap's caregivers on March 23, 2012. Kitsap however continued its campaign to deter union support by discharging or disciplining four known union supporters with previously unblemished records and prescribing new disciplinary rules. At the same time, Kitsap repeatedly delayed agreeing to dates for bargaining, instead insisting on selecting only one date at a time, cancelled dates unilaterally and refused to provide AFSCME with relevant information concerning

employees and revenue. When the parties did meet, Kitsap ended all meetings by noon. Kitsap insisted on a very broad management rights clause including the right to change wages based on its assessment of government support programs, and exclusion of these management "rights" from arbitration. In 2018, after complaint, hearing and briefing, a unanimous panel of Board Chair Ring and Members Pearce and McFerran found that Kitsap violated Section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act") prohibiting retaliation against union supporters and Section 8(a)(5) requiring good faith bargaining.

The D.C. Circuit panel agreed, affirming the Board's order, including novel remedial provisions. First, the Court affirmed reinstatement of the aggrieved employees with full back pay, rejecting as pretext the Employer's argument that the workers were "unfit" even if Kitsap did discriminate. The Court noted the workers' previously unblemished job records, in one case including glowing approval just before a post-union support write-up. Second, the Court agreed with the Board striking Kitsap's new disciplinary rules, observing that the "deviation from prior practice coincided with the union election" and Kitsap's "purported concern about a potential state audit was pretextual." Third, and perhaps most significantly, the Court upheld the Board's finding of Employer refusal to bargain and novel relief. "Kitsap's negotiator repeatedly failed to respond to union scheduling requests and cancelled or cut short several meetings," explained the Court. Kitsap also engaged in "regressive tactics" in its proposals and refusing to turn over information relevant to evaluate Employer proposals. In this regard, the Board had required Kitsap to supply information regarding revenue even though Kitsap insisted it never claimed inability to pay. That general objection, explained the Board, did not govern because Kitsap had expressly tied pay scale to its income stream from the state. In addition, though loath to discern "hard bargaining" from bad faith bargaining, the Board drew the line where, as here, the Employer insisted on terms - such as its broad management rights/no arbitration proposals – which made union representation an ineffective nullity. The D.C. Circuit deferred to that judgment.

The Board's bargaining remedy stands out:

> "Upon the Union's request, we order [Kitsap] to bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees. We shall also require [Kitsap] to submit written bargaining progress reports every 15 days . . . and serve copies . . . on the Union."

The Court of Appeals declined to review this remedy because not raised by the Employer in a motion for reconsideration before the Board.

This case offers insights both encouraging and depressing. On the encouraging side, the NLRB panel consisted of one Republican and one Democrat still on the Board, who saw through the Employer's bogus arguments on discharge and bargaining, including delays, information stalls and destructive proposals. On the discouraging side, practitioners recognize these arguments as union busting playbook tactics which the system took years to reject as the violator brazenly deferred employee representational rights. "Wins" like these will not engender or maintain union support. Accordingly, some unions will be looking to self-help remedies, especially given the Board and General Counsel's current overriding concern with employer well-being.

STOP [striking] & [resume] SHOP[ping]

After more than 10 days of striking Stop & Shop locations across the New England area, the largest private sector strike in at least the last 3 years is over with the supermarket chain and five United Food and Commercial Workers locals (UFCW) reaching a three-year agreement, which was ratified by members from multiple locals beginning on April 25, 2019.

On April 11, 2019, approximately 31,000 workers from hundreds of stores in Massachusetts, Connecticut and Rhode Island walked off the job after negotiations stalled on healthcare and retirement benefits. The supermarket attempted to slash associate pay by hiking health insurance premiums and deductibles and reducing pension benefits for new employees.

The strike received overwhelming support from local communities with many customers refusing to cross picket lines, waving, honking, beeping, and supplying meals to strikers on the front lines. Thousands of supporters donated approximately $54,000 to provide strike fund benefits to workers who were not getting paid during the work stoppage. The strike, which cost Stop & Shop about $2 million per day, even caught the attention of 2020 presidential hopefuls like Sen. Elizabeth Warren, Mayor Pete Buttigieg, and former Vice President Joe Biden.

According to the UFCW, under the terms of the new agreement, Stop & Shop will maintain health-care coverage and defined pension benefits, include wage increases and maintain premium pay on Sundays for current UFCW members. Stop & Shop posted an update on its website, saying the company is glad to see employees return to work, and that its top priority is to restock empty supermarkets.

The Stop & Shop strike is the latest sign that labor militancy continues to grow. The supermarket stoppage affected almost as many employees as the strike that shut down all of West Virginia's schools last year (25,000 teachers compared to 31,000 supermarket workers). Moreover, this past January, Los Angeles public school teachers shut down the nation's second-largest school district for more than a week. As attacks against the working class have shown no sign of subsiding, worker militancy will likely increase.

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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