Labor & Employment Issues
In Focus
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For Clients and Friends
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TENNIS COACH WINS REMATCH ON DISMISSED LAWSUIT FOR DISCRIMINATORY DISCHARGE OVER ALLEGED SEXUAL HARASSMENT

A male college tennis coach won his appeal from dismissal of his lawsuit alleging that Hofstra University discriminated against him based on his sex when it discharged him after a "clearly irregular" investigation of charges that he had sexually harassed a female student player. *Menaker v. Hofstra University*, 2d Cir. No. 18-3089 (Aug. 15, 2019). This case warns that even amid the pressures and glare of "Me-Too" age sexual harassment allegations, accused employees are still entitled to the processes promised in an employer's policies prior to discipline.

Hofstra University employed Jeffrey Menaker as coach for both its mens' and womens' tennis teams. A female player accused him of sexually inappropriate attention. Amid public outcry over lax responses to such allegations generally and a specific federal investigation of Hofstra's and other universities' anti-harassment efforts, Hofstra concluded its inquiry into the student's charges against Menaker and discharged him. Menaker sued under Title VII of the 1964 Civil Rights Act claiming that Hofstra fired him because he is male and his accuser female. The district court dismissed, finding no adequately pled anti-male discrimination under Title VII, and Menaker appealed.

The U.S. Court of Appeals for the Second Circuit reversed, sending the parties back to discovery and possible trial. Writing for the unanimous three judge panel, Judge Cabranes applied the Court's 2016 decision in *Doe v. Columbia University* which held that a male student adequately alleged anti-male discrimination under school based Title IX of the 1964 Civil Rights Act when claiming that Columbia wrongfully suspended him without appropriate investigation of a female student's sexual assault charges. Judge Cabranes reasoned the same analysis should apply to Title VII employee discrimination cases involving sexual harassment. Applying that standard to Menaker's allegations, which on a motion to dismiss must be accepted as true, Judge Cabranes found that Menaker had pled that Hofstra failed to follow its written sexual harassment procedures, did not interview his witnesses, ignored evidence that the student's allegations might be untrue and reacted to pressure rather than conduct a true investigative or adjudicative process. Bitingly, the Court likened Hofstra's explanations for its discharge of Menaker to the Queen of Hearts' legal philosophy in *Alice in Wonderland*: "Sentence first-verdict afterwards."

The Court concluded: "Where a university (a) takes an adverse employment action against an employee, (b) in response to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) and criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support a prima facie case of sex discrimination." For good measure the Court suggested that Hofstra could also be liable indirectly under a "cat's paw" theory where the student complainant (but not the university) is motivated at least in part by discriminatory animus and the university as a result of the complaint negligently or recklessly punishes the targeted employee.

Word of advice to employers caught in a whirlwind of allegations and accusations: Investigate fully and fairly, and remember what the Dormouse "said" - feed your *head*.

NLRB BROADLY PROHIBITS NON-EMPLOYEE LEAFLETING, REVERSING OBAMA ERA BOARD

In yet another reversal of precedent, on August 23, 2019, the National Labor Relations Board ("NLRB" or "Board"), by a 3-1 majority, again prioritized property owners' rights over the Section 7 and First Amendment rights of workers. In *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019), the Board held that where the property owner was not involved in a labor dispute, it may ban otherwise protected activity, in this case leafleting, by employees of other entities working on the property.

In *Bexar County*, off-duty employees of the San Antonio Symphony, which performs in the Tobin Center for the Performing Arts, wished to engage in informational picketing outside the theater about a labor dispute with management of the symphony. The owner of the theater prohibited the leafleting and moved the musicians off its property during a performance by Ballet San Antonio. The musicians had been passing out leaflets accusing Ballet San Antonio of costing them work by performing to recorded music rather than with the Symphony.

Traditionally, the Board, and the United States Supreme Court, have held that a property owner's employees may engage in Section 7 activities off duty and on site, however, non-employees of the property owner may be denied access. The Board has also held that employees of contractors working on the property have the same rights as the property owner's employees.

In *Bexar County*, the Board explicitly reversed this precedent, holding, "contractor employees are not generally entitled to the same Section 7 access rights as the property owner's own employees." Instead, "the contractor employees' right to access the property is derivative of their employer's right of access to conduct business there." As such, "[o]ff-duty employees of a contractor are trespassers and are entitled to access for Section 7 purposes only if the property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience. If there is at least one such channel . . . the property owner will be free to assert its fundamental property right to exclude without conflicting with Federal labor law."

This holding reversed the 2011 NLRB decision in *New York New York Hotel and Casino*, where the Board found that employers can bar off-duty workers for on-site contractors from handing out leaflets on their property only when letting them stay would "significantly interfere with" the employer's use of the property, or when excluding the workers is justified by another "legitimate business reason." In contrast, the Trump Board held that *New York New York* overly extended workers' rights to protect contractors' employees who come under a "right to exclude," continuing "we hold that contractor employees are not generally entitled to the same [NLRA] Section 7 access rights as the property owner's own employees." *New York New* York and its progeny, according to the majority, violated employers' Constitutional rights to control their properties. The majority left a small window for such leafleting to continue, allowing that if such workers work "regularly and exclusively on the property" and don't have one or more

"reasonably nontrespassory" ways of getting their point across, they can access the property.

Lauren McFerran, the lone Democratic appointee on the Board, contended that the protest sits "at the core of what the National Labor Relations Act protects." She also called the Board's new test for site access "arbitrary" and easy for employers to beat. "As in other recent decisions, the result here is, again, to dramatically scale back labor-law rights for a large segment of American workers — this time, employees who work regularly on property that does not belong to their employer."

NLRB LIMITS CLASS WAIVERS

In 2018, the United States Supreme Court ruled in *Epic Systems v. NLRB*, 584 U.S. ____, 138 S. Ct. 1612 (2018) that the Federal Arbitration Act makes individual arbitration agreements enforceable, regardless of the saving clause of the FAA or the National Labor Relations Act ("NLRA"). The Court wrote, "Congress has instructed federal courts to enforce arbitration agreements according to their terms — including terms providing for individualized proceedings." The Court observed that the Congressional intent behind the FAA was a "liberal federal policy favoring arbitration," whereas the NLRA dealt with the actions of collective bargaining, and that the "other concerted activities" language of Section 7 of the NLRA must be read with this intent and not towards dispute resolution. After *Epic*, it was inevitable that the National Labor Relations Board ("Board" or "NLRB") would jump in and now it has.

On August 14, 2019, the Board ruled in *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (August 14, 2019) that a restaurant owner lawfully compelled its employees to sign a revised mandatory arbitration agreement. The employer, owner of several restaurants in the Houston area, required its employees to sign a revised arbitration agreement prohibiting them from opting into a class or collective wage and hour action. The revision was in response to several employees opting in to a wage action. The previous agreement had prohibited filing class or collective actions, but not joining another action.

The Board considered two issues: first, whether the NLRA precludes employers from promulgating agreements containing class and collective action waivers and requiring one-on-one arbitration *after* employees opt-in to a collective action; and second whether the NLRA precludes employers from threatening to discharge an employee who refuses to sign a mandatory arbitration agreement. Specifically, *Cordua's* agreement required employees to waive their "right to file, participate or proceed in class or collective actions (including a Fair Labor Standards Act ('FLSA') collective action) in any civil court or arbitration proceeding." However, several employees filed a collective action alleging violations of the FLSA, prompting the revisions to the agreement that an employee "…cannot file or opt-in to a collective action under this Agreement…" A manager instructed the employees that they would be removed from the schedule if they refused to sign the revised agreement.

Using the Supreme Court's analysis in *Epic* as a starting point, the Board found that it was not unlawful under the NLRA for an employer to require waiver of class or collective wage and hour opt ins. Despite the fact that the employees were exercising Section 7 rights and the employer imposed the new agreement in response to employees participating in the wage and hour action, the NLRB found that the employer did not retaliate, because the new agreement itself did not actually restrict any protected activity. The NLRB reasoned that "because opting in to a collective action is merely a procedural step required in order to participate as a plaintiff

in a collective action, it follows that an arbitration agreement that prohibits employees from opting in to a collective action does not restrict the exercise of Section 7 rights, and accordingly, does not violate the [NLRA]." *Cordua Restaurants*, 368 NLRB No. 43, at *2 (Aug. 14, 2019).

Next, the Board found that the employer's statements were not unlawful threats of reprisal, but instead, "amounted to an explanation of the lawful consequences of failing to sign the agreement and an expression of the view that it would be preferable not to be removed from the schedule." The Board based its conclusion on the fact that *Epic Systems* allows an employer to condition employment on employees signing a mandatory arbitration provision that requires waiver of class and collective actions.

As a practical matter, this decision leaves unclear the question of whether employers are still prohibited from firing or taking adverse action against an employee who engages in a class or collective action. The Board seems to be drawing a distinction, valid or not, on the idea that barring the taking of a procedural step toward a class action is not the same as banning the joining of a class action. It seems that the Board's position is that employers may inform employees that their refusal to sign the arbitration agreement will result in their discharge. However, employers may not discharge an employee for the act of filing or opting in to a class or collective action.

In dissent, Board Member Lauren McFerran argued that the last point was completely at odds with Board precedent. The Board, she wrote, has historically found that a facially valid work rule must be struck down if it is promulgated in response to protected activity. Moreover, she wrote that the majority was incorrect that this precedent only applied to rules that imposed restrictions on union or other protected activity. The dissent underscored the concern that the Board now seems to be routinely reversing precedent on the thinnest of distinctions.

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HOPE YOU HAD A WONDERFUL LABOR DAY!!

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