Labor & Employment Issues
In Focus

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For Clients and Friends
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SECOND CIRCUIT AFFIRMS NLRB RULING PROTECTING FIRED SERVERS' EMAILS AS PROTECTED CONCERTED ACTIVITY

On October 15, 2019 the United States Court of Appeals for the Second Circuit enforced a decision by the National Labor Relations Board ("NLRB") in *Mexican Radio Corporation v. NLRB*, No. 18-1509, holding that the employer violated federal labor law by terminating four employees who cosigned a coworker's email that alleged a manager's abuses.

The employer restaurant operator, Mexican Radio Corp. ("Mexican Radio"), fired four servers who responded with electronic messages of support and thanks to a colleague's resignation note which was emailed to coworkers and management in October 2015. The email referenced the alleged misconduct of a new general manager and unsanitary conditions at the restaurant. The email communication contained several obscenities and called for the workers at the restaurant to "stand up for their rights." Workers at the restaurant had previously complained to the employer about the general manager's misconduct and the unsanitary conditions at the restaurant to no avail. The workers then complained to the New York City Department of Health and Mental Hygiene which angered the restaurant's management.

Mexican Radio argued that the terminated employees lacked NLRB protections for concerted activity because the actions were "opprobrious" under a four-part NLRB test established under *Atlantic Steel Co.* 245 NLRB 814 (1979). The *Atlantic Steel* test examines the alleged opprobrious action that took place, its subject matter, the nature of the outbursts and whether it was provoked by a violation of federal labor standards.

The Second Circuit reasoned that all four factors under the *Atlantic Steel* test cut against Mexican Radio. The Court stated that it would be "antithetical to the nature of concerted action" to rule that the use of email weighed against the workers when their actions were made outside the restaurant and only to "certain individuals" rather than a more public location such as the workplace. Further, the subject matter supports the terminated servers because the email "restated the concerns animating the employees' ongoing dialogue with management." The Court also held that the obscenities used in the initial email cannot be attributed to the responding workers, who did not make their own negative threat and that the emails appear to have been provoked by an implied threat from the general manager. Finally, the Court applied the Board's traditional *Wright Line* framework to conclude that the four would not have been fired but for their supportive emails.

Accordingly, since the four workers' emails did not meet the Second Circuit's definition of "opprobrious," they retained NLRB protection, whether or not the original employee message also met the *Atlantic Steel* test, or the more employee friendly standard noted by the Court for statements in a non-work forum, such as social media. *Three D, LLC*, 361 NLRB 308 (2014) *aff'd*, 629 F. Appx. 33 (2d Cir. 2015) and *Pier Sixty*, 855 F.3d 115 (2d Cir. 2017). As the Trump NLRB tightens restraints on employee speech it deems disrespectful of management, judicial decisions such as *Mexican Radio* may play an increasingly important role in protecting the rights of employees to speak out free from retaliation.

NJ FEDERAL DISTRICT COURT CLIPS
CARE ONE RICO CLAIM AGAINST SEIU

Employers locked in conflict with unions increasingly turn to two nuclear lawsuit options: anti-trust or Racketeer influenced Corrupt Organizations Act ("RICO"), both of which carry the potential of bankrupting a union with treble or punitive damages. The recent decision of Judge Wigenton in *Care One Management, LLC v. United Healthcare Workers East, SEIU 1199*, No. 12-6371 (SDW) (D.N.J. Oct. 28, 2019) dismissing one such action under RICO illustrates an array of "do's" which protected the union and implies some "don'ts" which unions ignore at their peril.

Care One Management, LLC and its affiliates manage scores of healthcare facilities in New Jersey, Connecticut and Massachusetts. United Healthcare Workers East, SEIU 1199 ("Union" or "SEIU") represented workers at some Connecticut facilities under a collective bargaining agreement, and sought to represent certain workers in some New Jersey facilities by National Labor Relations Board ("NLRB") proceedings which Care One resisted. When the CBA expired and Care One allegedly committed various unfair labor practices in both states, SEIU launched a "robust and often hard-charging" corporate campaign against Care One in 2011 which included NLRB charges, a strike, a "watch" website, print, radio and billboard advertisements, and demonstrations at Care One headquarters and at an NYU Law School ceremony honoring Care One's owner/CEO. The Union also filed oppositions to permits for Care One in Massachusetts and petitioned U.S. Senator Blumenthal to investigate Care One's billing practices. In 2012, certain Care One Connecticut facilities were vandalized, including sabotage of patient related charts and equipment, by unknown persons. Shortly thereafter in October 2012, Care One filed a RICO action against the Union for "a campaign of intimidation, interference, threats, deceptive trade practices, abuse of process, vandalism and other illegal and extortionate conduct." Following lengthy discovery, both sides moved for summary judgment.

Judge Susan D. Wigenton denied the employer's motion and granted the Union's, dismissing the case in a comprehensive 24 page decision sweeping from broad policy to minute detail. Judge Wigenton addressed each aspect of the alleged illegal acts which form the "predicates" or wrongful conduct for the RICO action, in order: extortion by sabotage/vandalism; extortion by economic pressure; mail and wire fraud; Travel Act; and RICO conspiracy.

First, although Care One's papers were "rife with conjecture and supposition", noted the Court, "nothing in the record supports a finding that any union member acted to sabotage" Care One's facilities, nor that the Union "ratified or authorized" such acts. On the contrary, SEIU denounced the crimes as "totally contrary to everything we stand for and believe in." Accordingly, no evidence created an issue of fact rebutting the Union's denial of any hand in the predicate acts of sabotage.

Next, the court held that the Union's end goals and tactics of economic pressure during the campaign were not "wrongful" predicate acts for a RICO claim. "Economic fear," observed Judge Wigenton, "is a driving force of our economy" without which "unions would be unable to impose any economic pressure on management because every strike, contract negotiations or attempt at unionization could be deemed extortion …" With this in mind, reasoned Judge Wigenton, Union goals for higher wages, closer staffing ratios and organizing facilities cannot be deemed illegitimate despite Care One's contrary preferences, especially where the NLRB

and appeals court found it was Care One which had violated the labor law. As to tactics, the Union did nothing improper in attempting to influence the regulatory process or reaching out to Senator Blumenthal where it believed its submissions relevant and did not hinge its efforts on Care One acceding to the Union's demands. Moreover, the protests and demonstrations themselves were peaceful without trespass, so that even if "harassing, upsetting or coercive … they remain protected," ruled the Court. "Plaintiffs obvious frustration … is insufficient to render Defendants'' action wrongful, she concluded.

Finally, the Court held that no reasonable jury could find an intent to deceive by the Union as required for mail or wire fraud, despite Care One's lengthy list of statements they allege were false and misleading. In rejecting fraudulent intent, the Court relied heavily on the Union's extensive fact-checking and vetting procedures, involving gathering factual information, drafting communications based on the information, providing the material to counsel for review and prior approvals and authorizations, all of which Union officials testified they believed to be true. Since the Court found no basis for any extortionate or fraudulent act, neither interstate travel nor conspiring to commit these lawful acts could be deemed wrongful. Accordingly, the Court granted SEIU summary judgment against the RICO lawsuit. Related state law claims were dismissed without prejudice.

A WEEK LATE AND PLENTY OF DOLLARS SHORT

As the Empire State continues to expand worker protections, the New York State Supreme Court, Appellate Division, First Department, contributed its fair share by issuing a noteworthy wage-and-hour decision on September 10, 2019, which should prompt employers to reexamine their frequency-of-pay practices and policies. In *Vega v. CM & Associates Construction Management LLC*, 107 N.Y.S.3d 286, 288 (N.Y. App. Div. 1st Dept. 2019), the Appellate Division held that the pay frequency requirements of New York's Labor Law "imply" a private right of action, leaving employers potentially exposed to liquidated damages for any violations.

Section 191(1)(a) of N.Y.'s Labor Law obligates employers to pay "manual workers" weekly and not later than "seven calendar days after the end of the week in which wages are earned." The class of workers in *Vega* alleged that their employer was violating the Labor Law by paying them biweekly. There was no dispute that the workers were paid in full or that they were "manual workers" pursuant to Section 190(4) of the Labor Law. The N.Y.S. Department of Labor has interpreted this to include individuals who spend more than 25% of their working time engaged in physical labor and can include barbers, pizzeria workers, and chauffeurs because they may be required to do "light to medium lifting and carrying of objects." *See e.g.*, DOL Opinion Letters RO-09-0066, RO-08-0061, and RO-07-0072.

The decision turned on whether the Labor Law § 191(1)(a) provided the Vega Class with a private right of actions since this provision was silent on the issue. First, the Appellate Division explained that by not paying the employees "what is … required," i.e., weekly pay, the employer was underpaying them, which does carry a private right of action. *Id*. at 288. Alternatively, implying a right to sue is permissible where it "would promote the legislative purpose of the statute and the creation of such a right would be consistent with the legislative scheme." *Id*. at 289. Here, granting the Vega Class this right "promotes the legislative purpose of § 191" and "deters abuse[r]s and violat[er]s of the labor laws." *Id*. Accordingly, the Court held that the Vega Class is both proper and entitled to liquidated damages as a remedy.

Employers should review their job duties to confirm which workers would qualify as manual, and if so, ensure they are being paid weekly. With a six-year statute of limitations for State wage and hour violations, employers should ensure strict compliance in the new glare of exposure to potentially hefty penalties.

A VETERANS DAY MESSAGE GOOD ALL YEAR

To all: Today America honors the men and women of our armed forces who have served and continue to serve our country. We must never forget their sacrifices—some ultimate and some both physically and mentally lingering and disabling—for all of us and our American way of life. May God bless them and America and each of you and those most dear to you.

Vincent F. Pitta

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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