Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."

Abraham Lincoln

THIRD CIRCUIT HOLDS THAT COURTS AND NOT ARBITRATORS DECIDE WHETHER AGREEMENT TO ARBITRATE EXISTS, EVEN IF AGREEMENT COMMITS THAT QUESTION TO ARBITRATOR

On September 14, 2020, the United States Court of Appeals for the Third Circuit held that courts, not arbitrators, decide whether disputes are subject to arbitration where one party denies that agreement to arbitrate ever existed at all, even where the agreement states that such questions must be decided by the arbitrators. *MZM Construction Company, Inc. v. New Jersey Building Laborers Statewide Benefits Funds*, Nos. 18-3791 & 19-3102 (9/14/2020)

In 2001, MZM Construction Company ("MZM"), a New Jersey corporation hired workers from a local labor union for a construction project at the Newark Liberty International Airport. The following year, MZM entered into a short-form agreement ("SFA") with the New Jersey Building Laborers, under circumstances alleged by MZM which led it to reasonably believe the agreement only applied to Newark Airport work.

The SFA contained a provision that both parties agreed to be bound by the conditions set forth in the 1999 Building, Site and Construction Agreement ("CBA") and its successor agreements. Under the CBA, MZM was required to make contributions to the New Jersey Building Laborers' Statewide Benefits Funds and to arbitrate all disputes. From 2001 to 2018, MZM remitted more than $500,000 in contributions to the Funds for work related to Newark Airport. Around 2014, the Funds audited MZM's financial information and concluded that MZM owed the Funds about $230,000 in contributions. The Funds unilaterally scheduled arbitration to begin on November 2018 to collect the outstanding contributions. MZM filed a complaint against the Funds, seeking to enjoin arbitration.

MZM argued that the SFA and the CBA did not include a binding arbitration agreement because of fraud in the execution of the SFA, MZM being led to believe it applied only to the Newark Airport work, which rendered the SFA invalid. The Funds argued that by agreeing to be subject to the CBA, MZM intended to be bound to the CBA's arbitration provision for all disputes with the union or Funds, including the CBA provision that the arbitrator "shall have the authority to decide whether an agreement exists." The lower court ruled in favor of MZM, holding "that there was a presumption that issues of arbitrability" are for the court to decide, and that the CBA

arbitrability clause did not overcome the presumption where MZM denied knowledge of the CBA and disputed the scope of the SFA.

Judge Luis Felipe Restrepo, writing for a three-judge panel, agreed with the lower court and concluded that "questions about the "making of the agreement to arbitrate" are for courts to decide unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract whose formation is not in issue." Judge Restrepo reasoned that section 4 of the Federal Arbitration Act which mandates that courts be satisfied that an arbitration agreement exists – "tilts the scale in favor of a judicial forum when a party rightfully resists arbitration on grounds that it never agreed to arbitrate at all." Judge Restrepo further concluded that "it can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement when one of the parties has put the existence of that very agreement in dispute." In this case, MZM put the existence of the CBA arbitration agreement in dispute by claiming fraud in the execution of the SFA. The Third Circuit now joins the Fourth, Sixth and Eighth Circuits on this legal question.

THIRD CIRCUIT, BY 2:1 DECISION, REJECTS "CLAWBACK" OF UNION DUES

Since the United States Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466 (2018) in 2018, disgruntled union represented workers have been trying to obtain refunds of agency fees paid to public sector unions prior to the decision. The United States Courts of Appeals have, usually unanimously, refused those requests. On August 28, 2020, the United States Court of Appeals for the Third Circuit, sitting in Philadelphia, in a very close 2-1 decision, became the most recent Court to find public sector unions can keep the dues paid by nonunion members while the so-called fair share practice was still backed by the U.S. Supreme Court.

In two cases involving the Pennsylvania state teachers' union and state employees' unions, the Third Circuit showed a deeply divided view of the issue. Judge Marjorie Rendell adopted the prevailing view of a good-faith defense, along with principles of equity and fairness, to preclude liability where a private actor relied on prevailing law. Judge Michael Fisher concurred in the judgment, relying on the historic principle that judicial decisions declaring laws invalid or overruling precedent do not generate retroactive civil liability. Conversely, Judge Peter Phipps argued that neither defense existed at common law, so the actions to recover past fees should proceed.

Judge Rendell wrote, drawing parallels to the jurisprudence under other statutory authority: "We join a growing consensus of our sister circuits who, in virtually identical cases, have held that because the unions collected the fair-share fees in good faith reliance on a governing state statute and Supreme Court precedent," that "they are entitled to a good faith defense that bars appellants' claims for monetary liability under § 1983." This view is similar to that taken by the Seventh Circuit Court of Appeals in Chicago, the Ninth Circuit in San Francisco, the Sixth Circuit in Cincinnati, and the Second Circuit in New York.

In dissent, Trump appointee Phipps wrote that he saw no valid reasons for recognizing the defenses cited by his colleagues, reasoning that the agency fees were not voluntary.

The case is *Diamond v. Pennsylvania State Education Ass'n*, 19-2812, 19-3906 (3d Cir. Aug. 28, 2020).

THE LATEST COVID CONSEQUENCE: BACK TO WORK, BACK TO LITIGATION

While employers and employees have till now been mostly occupied staying operational in the face of COVID, there may be a second phase in the coming months as COVID based lawsuits move into court. Here are some of the latest developments.

· McDonald's faces an attempted Illinois state court class action by employees alleging unsafe working conditions amounting to a "public nuisance." Conditions include working in too close proximity with other employees and customers; reusing masks and gloves; and providing insufficient information. The lawsuit is backed by SEIU.

· A hospital is being sued by a nurse terminated for not taking a mandatory flu shot she claims might cause an allergic reaction and violates her religious beliefs.

· Unions, both public and private sector have brought actions for court orders halting openings or requiring specific safety measures, on a variety of grounds from constitutional to arbitrary and capricious, from public nuisance to in aid of arbitration. These emergency proceedings have largely been unsuccessful.

Over all, about 72 COVID related lawsuits have been filed nationwide from April through August, mostly for termination, with more mutations to come.

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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