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 UPHOLDS DISCHARGE OF BNY MELLON EMPLOYEE FOR SOCIAL MEDIA POST PRAISING VIOLENCE

In today's polarized society, employees sometimes take to social media to air controversial, possibly violent views. Sorting through three, the U.S. Court of Appeals for the Third Circuit affirmed discharge of a white employee for wistfully praising running over protestors while waiving aside as non-comparable posts by two black employees that though "inappropriate and ill-advised," did not "encourage mass violence." *Ellis v. Bank of New York Mellon Corp.*, No. 20-2061 (3d Cir. March 4, 2021).

In response to a news story about criminal charges against a Pittsburgh official who drove his car into a crowd protesting the shooting of an unarmed black teenager by police, Bank employee Lisa Ellis, who is white, posted: "Total BS. Too bad he didn[']t have a bus to plow thr." The Bank fired Ellis for breach of ifs social media policy (the "Policy"). Ellis sued the Bank for race discrimination under Title VII of the Civil Rights Act ("Title VII") alleging that while firing her under the Policy, the Bank had retained two black employees who had likewise violated the Policy. The district court granted the Bank summary judgment and Ellis appealed.

The Court of Appeals affirmed summary judgment against Ellis, explaining that the three situations were not comparable. Ellis' post encouraged violence, stressed the Court. In contrast, one black employee's post merely expressed frustration with but did not threaten a white co-worker. The other post opined that "men who hurt women should commit suicide," but likewise did not advocate ex parte action. According to the Court, since Ellis' post "was far more egregious – and far more likely to harm BNY Mellon's reputation… no reasonable jury could find Ellis' conduct comparable to that of her former colleagues." In addition, though all three employees were subject to the same Policy, they worked at different locations under different supervisors who could have interpreted the Policy differently without bias. Accordingly, Ellis failed to make out a case of discrimination because she is white.

SECOND CIRCUIT: EMPLOYMENT AGREEMENT ARBITRATION CLAUSE DOES NOT EXTEND TO ERISA THIRD-PARTY PLAN FIDUCIARY

On March 4, 2021, the U.S. Court of Appeals for the Second Circuit reversed a lower court decision that had compelled plaintiff to arbitrate his claims under his employment arbitration agreement, finding that none of the facts relevant to the merits of plaintiff's claims based on the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA") related to his employment. *Cooper v. DST Systems, Inc.*, No. 17-2805.

The Arbitration Agreement in question provided that Clive Cooper, an employee of DST Systems, Inc. ("DST") agreed to arbitrate "all legal claims arising out of or relating to his employment," application for employment or termination of employment except "for workers' compensation benefits, unemployment compensation benefits, ERISA-related benefits provided under [the DST] sponsored benefit plan, or claims filed with the National Labor Relations Board."

Since 1973, DST retained Ruane Cunniff & Goldfarb Inc. ("Ruane") as a third-party investment manager and plan administrator of the DST sponsored benefit plans and as such as fiduciary of the plans under ERISA. By virtue of his employment, Cooper participated in one DST ERISA plan. In March 2016, Cooper filed a lawsuit against Ruane, DST and other DST employees alleging that defendants breached their fiduciary duties by allowing "catastrophic over-allocation" of plan assets in shares of Valeant Pharmaceuticals, which dramatically declined in value in 2015-2016. Subsequently, Cooper agreed to mediate his claims, thus voluntarily dismissing his claims against all defendants except for Ruane. Ruane then moved to compel Cooper to arbitrate his claims based on Cooper's Arbitration Agreement with DST. In 2017, the District Court for the Southern District of New York held that the fiduciary breach claims against Ruane related to Cooper's employment with DST and though Ruane was a non-signatory to the Arbitration Agreement, it was entitled to enforce the agreement against Cooper under the theory of equitable estoppel.

On appeal Cooper argued that neither the theory of equitable estoppel nor the Arbitration Agreement governed his claims. In agreeing with Cooper, Judges Carney and Lothier explained that the breach of fiduciary duty claims alleged by Cooper did not "relate to" Cooper's employment with DST under the terms of the Arbitration Agreement because in an employment arbitration agreement a claim will "relate to" employment "only if the merits of that claim involve facts particular to an individual plaintiff's own employment." Here, Cooper's claims turned "entirely" on Ruane's investment decisions and had "no connection" to Cooper's work performance, evaluations, treatment by supervisors, his compensation, or the conditions of his workplace. The Court further concluded that ERISA fiduciary claims were contemplated to impose liability on individual fiduciaries for breach of their duties under ERISA, and to interpret the language of the Arbitration

Agreement to mandate arbitration of these claims would unacceptably undercut the viability and public purpose of such actions. The Second Circuit noted that Cooper's claims could have been brought by other individuals and entities that were never employed by DST, such as spouses or other beneficiaries of plan participants, the Secretary of Labor or DST itself, further undermining the necessary particularity to Cooper. Since Cooper's claims were not covered by the Agreement, the majority did not decide, but expressed skepticism, that equitable estoppel rules would allow non-party Ruane to compel arbitration under an Agreement it never signed.

Judge Sullivan dissented, arguing that the Arbitration Agreement's broad "relating to" language created a traditional presumption of arbitrability which was not rebutted anywhere in the Agreement. Judge Sullivan further found that Cooper was equitably estopped from refusing to arbitrate because of his knowledge of Ruane's role in the plan and its close intertwining with DST in that regard.

Cooper v. DST Systems may be read as a special third-party ERISA exception to the general rule presuming and favoring arbitration under a broad arbitration clause, or it may signal a willingness by the Second Circuit to trim back that favorable presumption in special public policy circumstances. Further cases citing *Cooper* may well test its scope.

ONE YEAR INTO COVID-19 PANDEMIC UNION WAGE INCREASES ARE SLUGGISH

This month, the United States entered the one year anniversary of the COVID-19 pandemic. Data from the United States Department of Labor ("DOL") on union-negotiated wages in 173 collective bargaining agreements ("CBAs") found that wage increases are well below last year's levels in the contracts recorded prior to the unprecedented impact on the economy because of the COVID-19 pandemic.

The DOL data from the 173 CBAs found a 2.7% increase in wages for the first year of the contract compared to an average first-year increase of 3.5% for CBAs negotiated prior to the COVID-19 pandemic. The unprecedented number of unemployed Americans provided employers with leverage during negotiations as many unions focused on job protections. As of February 2021, the unemployment rate for the country remains at 6.2% compared to 3.5% in February 2020.

As the number of vaccinated Americans grows with more than 6 million doses administered in a single weekend, many economists forecast an economic turnaround. Hopefully, a booming economy and the pro-union Biden

administration will provide unions and labor organizations more leverage when negotiating CBAs to be able to restore wages to pre-pandemic levels.

REMINDER – NEW ROUND OF PAYCHECK PROTECTION PROGRAM FUNDS AVAILABLE - UNIONS AND SOME EMPLOYEE BENEFIT PLANS MAY BE ELIGIBLE – DEADLINE MARCH 31, 2021

On March 11, 2021 President Joe Biden signed the American Rescue Plan of 2021 ("ARPA"). The ARPA includes another $7.25 billion in funding for the Paycheck Protection Program ("PPP") and lifts some of the Program's earlier restrictions. The ARPA expands coverage to all Internal Revenue Code 501(c) entities including labor unions under 501(c)(5) and voluntary employee beneficiary association entities created pursuant to 501(c)(9), such as certain health benefit, vacation or other employee plans.

The PPP provides forgivable loans that can be used to cover payroll, rent, mortgage interest, utilities, and certain COVID-19 related expenses, such as personal protection equipment. Eligible entities are able to borrow from private financial institutions the lesser of 2.5 times the borrower's monthly payroll costs or $10 million. The PPP loans can be forgiven if at least 60% of the funds are spent on payroll costs over either an 8-week period or 24-week period.

Under the ARPA, entities will only qualify for a PPP loan if: (1) the entity does not receive more than 15% of its receipts from lobbying activity; (2) the lobbying activities of the entity do not compromise more than 15% of the total activities of the organization; (3) the cost of lobbying activities for the entity did not exceed $1,000,000 during the most recent tax year prior to February 15, 2020; and (4) the entity does not employ more than 300 employees. **Applications for a second draw of PPP loans are due on March 31, 2021**. Further guidance from the United States Small Business Administration is probably to be expected, but all 501 (c) organizations are encouraged to apply as soon as possible. This is a link to the SBA's website for guidance: https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources.

UNITED STATES SENATE CONFIRMS BOSTON MAYOR MARTY WALSH AS SECRETARY OF LABOR

By a vote of 68 to 29, the United States Senate confirms the former Mayor of Boston Marty Walsh as the 29th Secretary of Labor. We extend our congratulations to Secretary Walsh and wish him the best of good luck in his new position.

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