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

NEW YORK COURTS DISMISS DEFAMATION CLAIMS BY ALLEGED SEXUAL HARASSERS

Two recent decisions, one by the U.S. Court of Appeals for the Second Circuit and the other by New York State's Supreme Court, Appellate Division, First Department, make it more difficult for an accused sexual harasser to bring an action for defamation against the accuser.

In *Kinsey v. The New York Times*, 2d Cir. No. 20-1304 (March 15, 2021), the federal Court of Appeals affirmed dismissal of a defamation action brought by Kinsey, a high ranking U.S. Department of Justice official, against a former intern. The defendant male intern had submitted a declaration in a court case that Kinsey had "unwelcome liberties of a physical, sexual nature" with a female intern, and the *New York Times* (the "*Times*") reported on the testimony as part of an article. Kinsey sued the *Times* claiming that the contact was not unwelcome and that New York's fair report of a judicial proceeding qualified privilege did not apply because the article did not identify the court case with sufficient specificity for a reader to check the case itself. Not so ruled the Second Circuit. "Indeed, our case law does not require that the court filing ... be specifically identified," explained Circuit Judge Cabranes, joined by Chief Judge Livingston and Circuit Judge Lynch. "The key question is whether the reader is able to determine that the report is of a proceeding." Since the article referred to and included an image of the intern's declaration, the court ruled the privilege "unquestionably clear."

In *Segaille v. Carrega and New York Daily News Co. et al*, App. Div. 1st Dept. Index No. 02369/2020, App. Case No. 13314 (March 9, 2021), a four judge panel unanimously reversed Supreme Court, Kings County, which had declined to dismiss the defamation action. Segaille, an assistant district attorney in the Brooklyn District Attorney's office, sued *Daily News* reporter Carrega for allegedly falsely and with malice reporting to police that he had invasively kissed and groper her. Although Segaille argued, and the lower court agreed, that Carrega's police report was not privileged under qualified immunity because she knew it was false and therefore made with malice, the appeals court disagreed. Such a ruling amounts to an impossible per se rule that reports of sexual assault by their very nature are presumably malicious, the Court warned. However, "It is difficult to see how defendant could have been more succinct or restrained in her description of events while accomplishing her [lawful] purpose: to report to the police that she had been the victim of sexual assault," reasoned the Court. Since the report was nothing more than a "straightforward rendition of the incident" and plaintiff offered no evidence of knowing falsity, it could not be deemed actual malice and the defamation action was dismissed.

Advocates against sexual harassment hailed the decisions, especially the State Appellate Division decision, as realistic changes in how this area of law has moved from protecting the harasser to protecting the harassed. Indeed, the Appellate Division gave express voice to just these concerns: "The lower courts' ruling rings of outdated assumptions that have plagued sexual assault victims over time-namely, that women are likely to lie about sexual assaults and that, such complaints are inherently vituperative." Further, added the Court: "The lower courts' holding has the effect of dissuading a victim from seeking an order of protection since the sexual assault victim must file a police report in order to obtain an order of protection. It has the effect of emboldening sexual assaulters who seek to weaponize the legal system in order to silence their victims." Rejecting this "unacceptable result," both the federal and state courts in these cases have strongly affirmed a victim's qualified privilege to resist the alleged victimizer through lawful reporting and redress.

TWO STEPS FORWARD, ONE STEP BACK: UNIONIZATION EFFORTS CONTINUE WITH MIXED RESULTS

During the course of the last tumultuous 12 months, unions have sought to either expand their influence or to beat back anti-union sentiment of the sort that led to the defeat of organizing efforts in the Amazon fulfillment center in Bessemer, Alabama. Further, in the context of the COVID-19 pandemic, unions have used this global health crisis as a platform to expand worker protections. As such, there have been some notable efforts by unions to organize employees in areas generally devoid of organized labor, coupled with heavy hits to membership in industries suffering the most from the COVID pandemic.

Recently, the tech workers at the *New York Times* secured signature cards for a majority of employees in the job titles of software engineer, software designer, data analyst, and product manager at this newspaper. Given the *New York Times'* turn to a more digitally-based platform, these tech workers have become more valuable to the company and have become more in-demand. With this leverage in hand, the tech workers have sought voluntary recognition from the *New York Times*, which already has a unionized workforce consisting of newsroom workers and business staff members that are represented by the NewsGuild of New York. However, last week the *Times* rejected voluntary recognition. The next step at the *Times* will likely be a secret ballot election through the National Labor Relations Board for the tech workers. The organizing efforts follow the recent surge in unionizing efforts in other media companies, such as *BuzzFeed News, Vice, The New Yorker, Slate, and Vox*.

Additionally, workers at an independent music label called the Secretly Group, which is comprised of four, smaller music labels (Secretly Canadian, Jagjaguwar, Dead Ocean, and Ghostly International), are seeking to bring organized labor into an arena that has often been neglected. Although office staff at major music labels, such as Universal Music Group, Sony Music Entertainment, and Warner Music Group, are represented by SAG-AFTRA, the indie music scene has not kept pace. Thus, the Secretly Group Union seeks to change this dynamic. This union is seeking to address typical workplace concerns, such as low wages, inadequate health care benefits, and greater transparency in the work environment. One of the leaders of the Secretly Group Union stated their concerns as such: "We've all had friends say, 'Oh, you're so lucky. You get to work with music, you get a free ticket to a show or free drinks,' but drinks and shows and music don't pay our rent." They are currently asking the Secretly Group to voluntarily recognize the union.

Despite these efforts, a recent report, based on data compiled by the U.S. Department of Labor ("DOL") using the annual 2020 disclosures required under the Labor-Management Reporting and Disclosures Act ("LMRDA"), indicates that the total share of the country's unionized workforce fell by 2.2%. However, a deeper dive into these figures demonstrates that certain industries witnessed a sharper decline. The International Brotherhood of Teamsters ("IBT") saw a drop of 9%; the International Association of Machinists and Aerospace Workers ("IAMAW") lost 13% of its members; and UNITE HERE suffered a staggering 55% decline in its membership. Not surprisingly, the reason for these precipitous falls is inextricably intertwined with the industries serviced by these employees. The global pandemic crippled the hospitality industry, which drove down UNITE HERE's membership numbers, and the halt to commercial airline travel led to Boeing letting go of more than 25,000 employees, which equated into a sharp decline of members of IAMAW. However, all is not lost, union membership increased in the public sector, in large part, due to many employees being designated as "essential workers," and the United Auto Workers only lost less than 1% of its members, in large part due to the stable stock prices and encouraging financial reports from the major automotive manufacturers like Ford, General Motors, and Fiat Chrysler.

A CLOSER LOOK AT THE MULTIEMPLOYER PENSION PLAN RELIEF UNDER ARPA

As previously reported, the American Rescue Plan Act of 2021 (the "Act" or "ARPA") provides, in relevant part, much awaited relief for troubled multiemployer pension plans. Under these provisions, eligible "critical and declining" or insolvent plans could, upon application and subsequent Pension Benefit Guaranty Corporation ("PBGC") approval, receive special financial assistance in the form of a grant to be disbursed in a single, lump sum payment from the PBGC. ARPA prescribes that by July 9, 2021, the PBGC shall issue regulations setting forth the requirements for special assistance applications, limiting the materials necessary to decide on the applications, specifying dates for transfers of the financial assistance following approval of the application and providing an alternate application for plans that have been approved for viable and non-viable partition before the enactment of the Act.

ARPA prescribes that a multiemployer pension plan is deemed an "eligible" multiemployer plan for this relief if such plan (1) is in critical and declining status in any plan year beginning in 2020 through 2022; (2) has been approved for a suspension of benefits under the Multiemployer Pension Reform Act of 2014 ("MPRA") as of the date of ARPA's enactment; (3) is certified by the plan actuary to be in critical status in any plan year beginning in 2020 through 2022, have a modified funded percentage (this is the percentage equal to current value of plan assets/current liabilities) of less than 40 percent, and have a ratio of actives to inactives which is less than 2 to 3; or (4) has become insolvent after December 16, 2014 in accordance with Internal Revenue Code Section 418E and has remained insolvent and has not been terminated as of the date of enactment of ARPA. Further, the PBCG shall accept applicant plans' assumptions used in the most recently completed critical status certification before January 1, 2021, unless such assumptions are clearly erroneous. For certifications of plan status completed after December 31, 2020, an applicant plan shall determine whether it is in critical status or critical and declining status by using the assumptions the plan used in its more recently completed certification of plan status before January

1, 2021, unless such assumptions are clearly unreasonable. If an applicant plan determines that use of one or more prior assumptions is unreasonable, the plan may propose a change provided it furnishes a reason why the assumption is not reasonable and the PBCG shall accept such change unless it determines it is unreasonable.

ARPA also authorized the PBGC to issue regulations prioritizing special assistance applications. Accordingly, PBGC regulations may also provide that for the first two (2) years from the enactment of ARPA, the PBGC may prioritize the application process to allow applications from only those plans which would be or are likely to be insolvent within five (5) years, that have a projected present value of financial assistance payments exceeding one billion dollars if the financial assistance is not granted, that have implemented benefit suspensions as of the date of the enactment of ARPA or that the PBGC determines appropriate based on circumstances.

Under ARPA, a timely application for financial assistance shall be deemed approved unless the PBGC notifies the applicant plan within 120 days that the application is incomplete, that any proposed change in assumption is unreasonable or that the plan is not eligible for the assistance. The deadline to submit applications for this special assistance is December 31, 2025 and any revised applications shall be submitted no later than December 31, 2026. In any case where an application is approved by the PBCG, the financial assistance shall be effective on a date determined by the PBGC, but not later than one (1) year after the application is approved or deemed approved. Further, the PBCG shall not pay any special financial assistance after September 30, 2030. An applicant plan that receives special financial assistance is not eligible to apply for a new suspension of benefits under the MPRA and shall be deemed to be in critical status until the last plan year up to 2051.

Pursuant to the Act, the amount of financial assistance shall be the amount required for a plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance and ending on the last day of the plan year ending in 2051. In this context, the special financial assistance amount will not take into account an applicant plan previous reductions in participant and beneficiary accrued benefits as of the date of ARPA's enactment, or suspended benefits under an approved MPRA application. Accordingly, applicant plans receiving financial assistance are required to reinstate suspended benefits under an approved MPRA application as of the first of the month when the financial assistance occurs.

Finally, the Act prescribes that the special financial assistance may be used to make benefit payments and pay plan expenses. However, the special financial assistance shall be segregated from other plan assets and invested in investment-grade bonds or other investments as permitted by the PBCG.

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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