Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
May 13, 2021 Edition

"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

COURT OF APPEALS STRIKES DOWN TRUMP BOARD SECONDARY PICKETING DECISION AS A STRETCH TOO FAR

The United States Court of Appeals for the Ninth Circuit refused to enforce a decision and order of the Trump National Labor Relations Board ("NLRB" or "Board") that the Service Employees International Union ("SEIU") violated the secondary picketing provisions of the National Labor Relations Act ("NLRA" or "Act") by picketing outside of an office building where both the targeted employer and neutrals all worked. *SEIU v. NLRB*, 9th Cir. No. 19-70334 (April 28, 2021).

SEIU picketed an office building that joint employers Preferred Building Services and Ortiz Janitorial Services maintained in the fall of 2014, protesting alleged wage, working conditions and sexual harassment. The building owner terminated Preferred and Ortiz, who then terminated three picketers. SEIU filed charges, the Obama appointed General Counsel issued a complaint and an NLRB Administrative Law Judge ("ALJ") found that Preferred and Ortiz unlawfully fired the employees for their protected picketing activity. Upon review, the Trump appointed NLRB reversed the ALJ on the grounds that the picketing was unprotected because it violated the secondary picketing prohibitions of the Act. The Board concluded that although the picketing signs clearly stated the dispute was with Preferred as employer, a reference to a tenant in the union's leafletting – "We are calling on KGO Radio to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job..." – put coercive pressure on the neutral tenant by leading the public to believe that KGO Radio was their employer. The Board further held that meetings in which SEIU tried to persuade tenants and owner to support the workers was evidence of secondary intent. SEIU appealed.

The Court of Appeals rejected the Trump Board's holding, defended by then NLRB General Counsel Peter Robb, as based on "the thinnest of reeds" that could not withstand scrutiny "even granting the Board the deference it is due." The Court explained that isolating one sentence from the leaflets could not outweigh the conceded facts that in all other aspects the signs, slogans, chants and leaflets all identified Preferred as employer, often in block letters. Furthermore, with such identification, the public would understand that reference to the tenant was only a request for help, not pressure on the neutral employer. Finally, the Court found that the meetings between SEIU and owner did not rebut the presumption of lawful picketing activities because SEIU never

threatened picketing against owner, just Preferred. Concluding that referring to neutrals in picketing materials and addressing them in meetings or communications "is permissible as long as it remains clear that the dispute is with the primary employer," the Court remanded the case to the still Trump Board, chaired by a Biden appointee, "for further proceedings consistent with this opinion."

SINGING A DIFFERENT TUNE: NLRB ACTING GENERAL COUNSEL REVERSES COURSE ON GAG ORDERS

On May 6, 2021, the National Labor Relations Board ("NLRB" or "Board") permitted its Acting General Counsel, Peter Sung Ohr, to withdraw an appeal of decision issued by Administrative Law Judge ("ALJ") Michael Rosas that addressed the legality of employer-imposed gag orders on employees that survive after workplace investigations had concluded.

In an Obama-era decision, the NLRB determined that employer-imposed gag orders on employees during the course of internal investigations would be analyzed on a case-by-case basis and would only be upheld in the event that the integrity of said investigation would be compromised without existence of a gag order, thereby ensuring confidentiality. *See Banner Estrella Medical Center*, 362 NLRB 1108 (2015). Then in 2019, under the Republican-controlled Board, the NLRB determined that the standard enunciated in *Banner Estrella* improperly placed the burden on the employer to determine whether its interests in maintaining the integrity and confidentiality of an investigation outweighed the statutory rights of employees under § 7 of the National Labor Relations Act ("NLRA"). *See Apogee Retail LLC*, 368 NLRB 144 (2019). Accordingly, the Board held that employer-imposed work rules requiring confidentiality of workplace investigations were presumptively lawful.

Then in September 2020, ALJ Rosas issued an opinion that sought to limit the over-reaching pronouncement set forth in *Apogee Retail* and held that an employer's post-investigation gag order was not presumptively lawful. *See Stericycle, Inc.*, NLRB Case No.: 04-CA-137660. According to ALJ Rosas, the purpose of employer-imposed gag orders is to assist the employer in protecting evidence and maintaining the integrity of an investigation. However, in *Stericycle*, the work rule stated that: "all parties involved in the [internal] investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable." *Id.* ALJ Rosas determined that such a rule imposed confidentiality not just to ongoing probes, but also to investigations that had already been resolved. Accordingly, the legitimate employer interests expressed in *Apogee Retail* were not present in the instant circumstances. Therefore, this work rule could not be presumed to be lawful, especially in light of the statutory rights under NLRA § 7 of employees to discuss their workplace concerns with coworkers and/or their union. Specifically, ALJ Rosas found that this work rule "could severely limit [the employee's] option for recourse and prevent them from speaking out when the company does not satisfactorily respond to a complaint. It also can be reasonably construed to preclude communications with union representatives, for which there is no legitimate business justification." *Id.* As such, ALJ Rosas

ordered, amongst other things, the rescission of "the entire . . . Handbook provided to . . . bargaining unit employees," and the employer negotiate in good faith with the union over the implementation of a new handbook. *Id.*

Thereafter, both the employer and the NLRB, under then-General Counsel Peter Robb, appealed ALJ Rosas' decision ordering the withdrawal of the entire employee handbook, as well as seeking to overturn a ALJ Board decision that erodes the "presumptively legal" proclamation set out in *Apogee Retail*. The decision by the Board earlier this month to permit Acting General Counsel Ohr to rescind its appeal in *Stericycle* seeking the reinstitution of the employee handbook in question indicates that the Board may be moving away from its employer-friendly leanings that were indicative of the Trump-era NLRB and its former General Counsel. Nevertheless, the employer's appeal is still pending.

GOVERNOR CUOMO SIGNS HERO ACT, OFFERING GREATER WORKPLACE COVID PROTECTION

In an ongoing effort trumpeted by Governor Cuomo for months, he recently signed into law the New York Health and Essential Rights Act ("HERO Act" or "Act"), which amends New York Labor Law §§ 27-d and 218-b and establishes additional workplace protections in an effort to prevent the spread of contagious diseases. As a first step, the state Commissioner of Labor will be required to consult with the Department of Health to create a standard for managing the prevention of airborne diseases and to establish minimum requirements for preventing exposure to airborne infectious diseases in the workplace.

In addition, the new law mandates that employers of 10 or more employees establish labor management committees to meet four times a year, to address these issues. The HERO Act authorizes committees to: (1) raise health and safety issues to employers; (2) review and comment on health and safety policies; (3) review policies enacted in the workplace in response to, among other things, laws and executive orders; (4) participate in government workplace site visits; (5) review employer-filed reports pertaining to workplace health and safety; and (6) schedule and meet quarterly during working hours. Employers are not permitted to retaliate against employees involved in safety committees.

The bill establishes specific workplace standards including employee health screenings, face covering requirements, provision of personal protective equipment ("PPE"), hand-hygiene stations and time to use them, regular cleaning and disinfecting of shared equipment, social distancing, verbal review of infectious disease standards, and many additional compliance requirements. The Act becomes effective June 4, 2021, with the exception that the committees need not meet until November.

Employers may adopt either the model standard set out in the HERO Act or an alternative plan that equals or exceeds the minimum standards provided by the model standard. The adoption of an alternative plan by an employer of a non-unionized workforce must be developed with

"meaningful participation" from its employees. With respect to a unionized workforce, the HERO Act provides that any plan must be developed "pursuant to an agreement with the collective bargaining representative" and "such plan shall be tailored and specific to hazards in the specific industry and work sites of the employer." Further, the provisions contained in the HERO Act may be waived by a collective bargaining agreement, "provided that for such waiver to be valid, it shall explicitly reference [the Act]." Finally, failure to follow the law's requirements may result in fines and penalties from $50 per day for failure to implement a plan to a range of fines from $1,000 to $10,000 for failure to abide by an established plan.

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