Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
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SEX, LIES AND A RACY TEXT MESSAGE LAND BANK IN HARASSMENT/RETALIATION TRIAL

Barbini v. First Niagara Bank, NA, *Key Bank NA*, SDNY No 16-civ-7887 (NSR) (Jan. 14, 2022) illustrates how support for a co-worker's internal harassment complaint can give rise to a retaliation claim, and the need for employers to keep their policies written and uniformly observed. Failure to heed these principles led one federal district court to deny the employer's motion for summary judgment clearing the way for trial on two employees' gender discrimination, harassment and retaliation claims under federal and state law.

Plaintiff Claudia Barbini, a longtime employee and newcomer Maryetta Henry, both worked for First Niagara Bank (the "Bank") under the supervision of Hugh Lawless. Henry took offense when she received a sexually charged text from Lawless directing her to kink.com; Lawless later explained it was intended for his wife. Barbini encouraged Henry to complain to HR and accompanied her to interviews for support. Thirty days later both women were discharged for allegedly violating a zero-tolerance notarization policy.

Both women then sued alleging a variety of discrimination claims, including gender and retaliation under Title VII of the Civil Rights Act of 1964 (Title VII) and the New York State Human Rights Law. Following discovery, the Bank moved for summary judgment, arguing that the discharges were undisputedly neither for gender nor retaliation but in adherence to the notarization policy. Judge Nelson S. Roman did not agree, denying summary judgment for an abundance of disputed material facts.

First, the key bank notarization policy was not written and Plaintiffs claimed it did not exist. Second, discharge within 30 days of the prohibited activity could reasonably support a jury finding for Plaintiffs, said the Court. Third, both Plaintiffs had good prior work histories. Finally, while the two women and a third were discharged for violating the policy, only two of four men were so disciplined. While the Bank insisted on contrary facts and inferences, these were questions for the jury, precluding summary judgment, reasoned the Court. As to the Bank's argument that Barbini was not protected because she did not suffer the sexual text, Judge Roman ruled: "if an employee . . . actively supports other employees in asserting their Title VII rights . . . that employee has engaged in protected activity." Accordingly, the Court cleared Plaintiffs' gender and retaliation based claims for trial.

COVID-19 UPDATES

NYS Mask or Vax Policy Extended Through February 10, 2022 for Business

Governor Hochul has extended New York State's mask or vaccination mandate once again, from planned expiration on February 1 to and through February 10, 2022. The Governor stated that she will reassess the policy every two weeks.

Appeals Court Continues NYS Mask or Vax Mandate At Least to March 2

On Friday, January 28, 2022, Plaintiffs in *Demetriou v. NY State Dept. of Health*, Docket # 2022-00532 (App. Div. 2d Dep't) filed papers asking the Appellate Division, Second Department to reinstate the stay of the State's mask or vaccination mandate issued by Supreme Court Justice Rademaker but which had been itself stayed by the Appellate Division one day later on January 25, 2022. Plaintiffs' papers argue that: the Appellate Division lacks authority to stay the lower court's injunction; stay of the mandate poses no irreparable harm nor balance of equities favoring the mandate; and the State lacks a likelihood of success on the merits given the absence of legislative authorization of the executive ordered mandate.

In a marvel of real world efficiency, the Appellate Division rejected all of Plaintiffs' arguments without saying so and without the mess of sorting through them. The Court simply gave New York State until March 2 to file its papers opposing Plaintiffs' arguments and continued its stay of Justice Rademaker's injunction pending Appellate Court decision. This keeps the mask or vaccinate mandate in effect and gives Governor Hochul plenty of room, with more room as needed, to maintain her mandate at least through March 2 and likely beyond pending the Court's decision.

CDC Updates "Close Contact" Definition

The Centers for Disease Control and Prevention ("CDC") revised the definition of a "close contact;" a close contact is now defined as "[s]omeone who was less than 6 feet away from an infected person (laboratory-confirmed or a clinical diagnosis) for a cumulative total of 15 minutes or more over a 24-hour period." The revised definition includes an example: "*three individual 5-minute exposures for a total of 15 minutes*."

The close contact definition warns that an infected person can spread SARS-CoV-2 "starting 2 days before they have any symptoms (or, for asymptomatic people, 2 days before the positive specimen collection date)." If an individual is identified as a close contact, she/he/they should follow CDC recommendations to quarantine, get tested, and wear a well-fitting mask after exposure – recommendations will vary depending on

vaccination status. CDC recommendations can be found here: https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html.

RETALIATION & CONSPIRACY CLAIMS DISMISSED AGAINST STATE COURT SYSTEM EMPLOYER & CHIEF JUDGE DiFIORE

Dennis Quirk, the former President of the New York State Court Officers Association ("COA"), which represents approximately 1,500 court officers throughout the State, saw his whistleblower lawsuit dismissed as, among other reasons, barred by state immunity provisions of the 11th Amendment. *Quirk et al. v. DiFiore et al.*, No. 1:20-cv-05027 (S.D.N.Y., Jan. 28, 2022) (Dkt. 79). The litigation was brought against the Honorable Janet DiFiore, the Chief Judge of the State of New York who controls the Office of Court Administration ("OCA"), the Court System's executive branch responsible for promulgating rules and policies such as those to address safety measures related to the spread of COVID-19.

Since the height of the Coronavirus pandemic, Quirk has claimed that the Court System failed to adequately protect COA members from COVID-19 due to an insufficient amount of personal protective equipment, and its failure to properly sterilize work areas within State courthouses. Quirk voiced his concerns vocally and in writing on certain social media platforms. Consequently, Quirk contended that OCA retaliated and threatened him with suspension and disciplinary action. Quirk sued and claimed deprivation of his First and Fourteenth Amendment rights to free speech and free association, conspiracy to deprive him of his constitutional rights under 42 U.S.C. § 1983 ("Section 1983"), violations of Occupational Safety and Health Act ("OSHA"), imminent and substantial endangerment, the State's whistleblower statute, and public nuisance. Defendants sought dismissal for failure to state a claim and lack of subject matter jurisdiction due to, among other defenses, sovereign immunity. U.S. District Court Paul Oetken agreed, dismissed all claims, and denied Quirk's attempts to amend his complaint as futile.

The Second Circuit Court of Appeals has continued to recognize the Court System, of which OCA is the administrative arm, as a state instrumentality protected by 11th Amendment. Quirk, however, claimed that the Defendants waived those protections by actively participating in the lawsuit. The Court declined to apply the waiver exception to Defendants, especially here, where the Defendants' participation was limited to defending themselves against Quirk's claims, rather than affirmatively and voluntarily invoking federal jurisdiction.

The Court also dismissed Quirk's First Amendment retaliation and Section 1983 conspiracy claims against Chief Judge DiFiore based upon the pleadings. Personal involvement by a defendant in a constitutional deprivation claim is a prerequisite for finding liability and the Court found the complaint bereft of any allegations that Chief Judge DiFiore personally undertook actions in retaliation against Quirk for publicly objecting to OCA's COVID-19 policies. To establish liability under Section 1983 for

conspiracy, a plaintiff must allege, among other elements, an agreement between a state actor and a private party. Here, however, all named Defendants are state actors and the complaint failed to reference any private party involved in the ostensible conspiracy. Regarding the OSHA and Imminent and Substantial Endangerment claims, the Court dismissed both explaining that the statute only provides the U.S. Secretary of Labor the authority to bring the former and Quirk failed to provide a legal source for the latter. Finally, since none of the federal claims survived dismissal, the Court declined to exercise jurisdiction over his remaining state-law claims.

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