Labor & Employment Issues
Client Alert

Pitta LLP
For Clients and Friends
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NOTHING LASTS FOREVER: N.Y. COURT OF APPEALS FINDS AGAINST RETIREES' EFFORT TO STOP THE RAISING OF MEDICAL INSURANCE PREMIUMS

On February 10, 2022, the New York State Court of Appeals ("Court"), in *Donohue et al. v. Cuomo, et al.*, __ N.Y.3d __ (2022), dismissed the complaint filed initially by the Civil Service Employees Association, Local 1000, the largest bargaining representative for New York State public sector employees ("CSEA"), alleging a violation of the United States Constitution. This case arose out of a decision by the State of New York ("State") to reduce the amount of health care contributions the State provided to subsidize the health insurance coverage for retirees and their dependents. The plaintiffs in this case contended that the reduction in this subsidy resulted in an increased cost to the retirees, who were required to pay more for their coverage. They averred that this reduction constituted a breach of the terms and conditions of their respective collective bargaining agreements at the time of their retirements. According to the plaintiffs, such a diminution of benefits contravened Article I, Section 10, Clause 1 of the United States Constitution, which is known as the Contracts Clause and provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Court of Appeals did not agree.

In analyzing this dispute, the Court resolved the question of whether language in a collective bargaining agreement with respect to retiree health insurance "create[s] a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA." *Donohue*, at 9. In order to resolve this open question first posited by the Court in *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 354 (2013), the Court applied "established contract principles" to determine that the State's reduction in retiree health care contributions did not impair any obligation contained in the applicable collective bargaining agreements of the plaintiffs. *See M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015). Using *Kolbe* as its point of embarkation, the Court reiterated that "contractual rights and obligations generally do not survive beyond the termination of a CBA." *Id.*, at 17. So, to find otherwise, the applicable contractual provision must expressly provide a vested right that the parties' intended to continue beyond the durational limits of the agreement. The Court determined, as a matter of law, that the provisions in the applicable collective bargaining agreements needed to provide for, *inter alia*, the retention of health insurance coverage into retirement and specify the contribution rate for retirees and dependents, in order to "establish a vested right to lifetime fixed premium contributions, either singularly or in combination," but did not. *Id.*, at 19. Further, the Court rejected the application of inferences in favor of the creation of a vested, contractual right that extends beyond the lifetime of the contract, which was a concept explained in *International Union, United Automobile, Aerospace, & Agriculture Implement Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). The Court stated that adherence to established contractual interpretation principles "preclude

a New York court from disregarding the precise terminology that the parties used . . ., thereby promoting our commitment to impart stability to commercial transactions in this State." *Id.*, at 18. Accordingly, the Court of Appeals dismissed the complaint.

ONGOING SAGA INVOLVING VACCINE MANDATE: NEW YORK CITY TEACHERS RENEW REQUEST TO SCOTUS FOR INJUNCTIVE RELIEF TO STOP LOOMING TERMINATIONS

On February 14, 2022, counsel for certain New York City teachers, who objected to the Citywide vaccine mandate due to their religious beliefs, directed a new request for injunctive relief against the vaccination requirement to United States Supreme Court Justice Neil Gorsuch after Justice Sonia Sotomayor denied their earlier request for an injunction without referring the matter to the full court. This renewed application was made pursuant to Rule 22.4 of the Rules of the Supreme Court of the United States, and was referred to the full Court by Justice Gorsuch on February 16, 2022. *Keil v. City of New York*, Docket No. 21A398.

The case presents a challenge to the City's vaccine mandate, issued last summer by former Mayor Bill de Blasio, that required all municipal workers – including teachers employed by the Department of Education ("DOE") – to receive one dose of the COVID-19 vaccination by the time schools re-opened in mid-September ("DOE Mandate"). The DOE Mandate was initially scheduled for take effect on September 27, 2021, but was later moved because this original iteration of the DOE Mandate did not account for exemptions based upon religiously-based or medically-based reasonable accommodations. The DOE then modified the DOE Mandate to provide that: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law." According to the complaint, bargaining between the DOE and unions representing teachers, supervisors and administrators thereafter "produced a set of Exemption Standards that purported to provide such [religious and medical] accommodations," but the standards used by the DOE "did not apply to all DOE employees and failed to protect the basic constitutional right to religious freedom."

According to the letter written by plaintiff's counsel to Justice Gorsuch, the DOE has begun firing teachers who refuse COVID-19 vaccination for religious reasons. The plaintiffs argued that the Second Circuit "found that the Department's prior implementation of its vaccine mandate was unconstitutional but gave the City a third chance to review Applicants' exemption requests" by a Citywide panel composed of attorneys from several City agencies created solely to review of COVID-19 accommodations. In an earlier application to the United States District Court, the plaintiffs noted that the Citywide panel had denied 13 out of 14 applications with no explanation except indicating that said requests "fail[ed] to meet criteria" and requested that the District Court provide an injunction, which it declined to do so. The Second Circuit scheduled a full hearing for February 24, even though a number of the plaintiffs were scheduled to be terminated on February 11.

In its letter to Justice Gorsuch, the plaintiffs requested the United States Supreme Court to issue an emergency injunction against terminations arguing that because the Department sent termination notices with different hearing dates including February 11 and 14, these individual DOE employees "will lose either their religious (and bodily) integrity or their employment." Specifically, the plaintiffs requested that the Court "enjoin the termination of the Applicants until the Second Circuit Merits Panel has issued its decision, and for thirty days thereafter to allow time for Applicants to prepare a petition for certiorari if necessary." Although Justice Gorsuch did not issue a stay of the lower court's ruling, he did refer the matter to the full panel, which is expected to review the petition in early March.

VACCINATION DISCRIMINATION AND DUE PROCESS CLAIMS AGAINST NEW YORK CITY AND SEVERAL CITY AGENCIES DISMISSED

On February 16, 2022, the Police Benevolent Association of New York City ("PBA"), which represents approximately 24,000 police officers ("Officers") employed by the New York City Police Department ("NYPD"), and about 10 Officers assigned to commands in Richmond County (collectively, "Petitioners"), saw their petition seeking injunctive relief against the Citywide vaccine mandate dismissed. *PBA et al. v. Bill de Blasio et al.*, Index No. 85229/2021 (Sup. Ct., N.Y. Co. Feb. 16, 2022). The litigation was initiated against then-Mayor Bill de Blasio, the City Department of Health and Mental Hygiene ("DOHMH"), the NYPD, the DOHMH Commissioner, and the City Board of Health (collectively, "Respondents") alleging, *inter alia*, constitutional and due process violations in connection with the City's unilateral change from a "vax or test" policy to a vaccine only mandate.

Since the start of the COVID-19 pandemic, the City has issued many emergency orders aimed at reducing the spread of COVID-19. Initially, the City permitted Officers to either receive the full required dosage of a COVID-19 vaccine or submit to weekly testing. This changed on October 20, 2021, when DOHMH and then-Mayor de Blasio mandated vaccine only for City employees, including Officers, effective November 1, 2021, subject to limited exceptions for disability and religious accommodations ("Mandate"). Non-compliant Officers would initially be carried on leave without pay ("LWOP"), and eventually, summarily terminated. At the time of this civil action, approximately 100 Officers were carried LWOP and approximately 3,900 had pending accommodation requests.

Petitioners sought to stop enforcement of the Mandate and premised their theories under Article 78 of the Civil Practice Law and Rules (*i.e.*, arbitrary and capricious government action), the New York State Human Rights Law ("SHRL"), the New York City Human Rights Law ("CHRL"), and the New York State Constitution. Respondents moved to dismiss the petition arguing that no irreparable damage could be established, but *assuming arguendo*, its decisions and orders were lawful as it sought to protect the citizenry from this deadly virus and therefore, Petitioners could not legally establish their claims. Justice Lizette Colon of the New York State Supreme Court, Richmond County,

agreed with Respondents, dismissed all claims, and denied Petitioners' attempts to obtain temporary injunctive relief against termination.

The Court denied Petitioners' application for injunctive relief, explaining that even considering the Officers' loss of medical benefits as an irreparable injury, it was outweighed by the damage to the public health of the City in terms of hospitalizations, serious illness, and deaths, which the Mandate sought to prevent. Regarding the underlying claims, the Court explained that the City sufficiently demonstrated that the Mandate was based upon a totality of evidence and opinions, despite some conflicts in data and/or expert opinions. The Court further noted that nothing in the record established that an Officer who has natural immunity would be harmed by receiving a vaccination. The Court also found that the record was devoid of any proof that the approximately 3,900 reasonable accommodation applications submitted by PBA members were not processed and/or decided with disregard to the SHRL or CHRL. As the Court observed that such claims were purely "speculative" due to limited allegations regarding their sufficiency, the claim of an insufficient and unlawful accommodation process was also dismissed.

AMAZON AGREES TO HOLD ELECTION AT STATEN ISLAND WAREHOUSE

On February 16, 2022, the National Labor Relations Board ("NLRB") announced that the corporate behemoth Amazon.com Inc. ("Amazon") and the Amazon Labor Union ("ALU") have reached a tentative agreement to conduct a union representation election at the Staten Island warehouse that stood as the local epicenter of the battle over workplace and safety guidelines during nascent stages of the COVID-19 pandemic. All parties involved, the NLRB, Amazon, and ALU, have represented that this election will occur in the near future, but no date of said election has been announced.

This most recent attempt at organizing Amazon will occur against the backdrop of Amazon's recent victory in the representation election that took place in the Bessemer, Alabama fulfillment center involving an attempt by the Retail, Wholesale and Department Store Union ("RWDSU"). And although the NLRB's regional office overturned the results of that election and granted the union a second chance due to Amazon's misconduct, Amazon still stands as a powerful giant standing in the way of its employees becoming unionized. As if to underscore the point, the RWDSU filed three unfair labor practice charges against Amazon on February 22 alleging that the employer interfered with the employees' rights during the current ongoing second election, ballots therein are to be counted on March 28, 2022.

NLRB MAKES NEW APPOINTMENTS TO REGIONAL OFFICES IN MANHATTAN AND CLEVELAND

On February 17, 2022, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo announced two regional attorney appointments. Olga Torres will serve as Regional Attorney of Region 2, which covers Manhattan. Ms. Torres has been an attorney in Region 2 since 1994 and has served as a Supervisory Field Attorney since 2015. General Counsel Abruzzo also announced that Gregory Gleine will serve as Regional Attorney of Region 8, which includes Cleveland, Ohio. Mr. Gleine joined Region 8 as a Field Attorney in 2000 and was promoted to Supervisory Attorney in 2014. These appointments follow closely the appointments of new Regional Attorneys in Region 1 (Boston) and Region 10 (Atlanta), as well as the appointment of a new Regional Director in Region 3 (Buffalo). A theme running through all the appointments is substantial agency experience.

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