Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
March 22, 2022 Edition

COVID-19 NO LONGER DESIGNATED AS A "SERIOUS RISK OF HARM TO THE PUBLIC HEALTH" UNDER THE NY HERO ACT

On March 16, 2022, the New York Health and Essential Rights Act's ("NY HERO Act's") website was updated to confirm that, effective immediately, COVID-19 no longer will be designated as "an airborne infectious disease that presents a serious risk of harm to the public health under the [NY] HERO Act." Ending the designation of COVID-19 as such means as a practical matter that employers will no longer be required to continue daily pre-workday health screenings.

Employers are still required to have a prevention plan in place for the future should the New York State Commissioner of Health either redesignate COVID-19 or, presumably, designate some other disease as a highly contagious communicable airborne infectious disease under the NY HERO Act. In addition, employers, as previously, will have to provide a copy of the prevention plan and post the same "in a visible and prominent location within each worksite." Employers are not required to use the template prevention plans jointly provided by the United States Department of Labor and the New York State Department of Health and available on the NY HERO Act website, so long as said employers create an alternative plan "that meets or exceeds the standard's minimum requirements."

The fact that COVID-19 is no longer designated as a highly contagious communicable airborne infectious disease under the NY HERO Act does not impact whether employers must comply with the private employer workplace vaccination mandate. Indeed, New York City's new health commissioner confirmed that the private employer vaccination mandate remains in place, meaning that employers are required to allow only fully-vaccinated employees into the workplace, unless someone shows a need for a reasonable accommodation. As a reminder, the private employer vaccination mandate is different than the Mayor's "Key to NYC" requirements for venues like bars and restaurants, the latter of which ended on March 7, 2022.

The NY HERO Act website and their resources can be accessed by clicking the following link: https://dol.ny.gov/ny-hero-act.

SCOTUS CONTINUES TO TURN AWAY COVID RELIGIOUS EXEMPTION APPEALS

While the COVID-19 virus ebbs and mutates, litigation by employees challenging adverse decisions denying them religious accommodations continues in full sway. The U.S. Supreme Court recently declined to hear appeals in two such cases.

In *Kell v. City of New York*, U.S. No. 21-A398 (March 6, 2022) a group of school workers, part of over 1,400 employees discharged for non-vaccination, sought to enjoin New York City from discharging them for not vaccinating after their religious exemption requests were denied. This case caught national attention when, after Justice Sotomayor declined to refer the case to the Court, Justice Gorsuch reached out and did just that, prompting speculation of a shift in the Court's attitude. However, on Justice Gorsuch's referral, the full Court declined to hear the appeal, confirming that a majority of the country's highest court still will not intervene when a state or local government mandates vaccination even if an accommodation is denied.

A.A. v. M.A., U.S. No. 21-958 (March 7, 2022) illustrates the same point with a personal twist. Mother Albena A., refused to allow her daughter to be vaccinated because of A.A.'s sincere religious beliefs. Father Marc A. sought vaccination and won on the grounds that the religious request was not sincere. On appeal to the U.S. Supreme Court, A.A. argued that employer sincerity tests probing religious beliefs were unconstitutional. The high court declined to open that door to carte blanche employee exemption, leaving the array of employer tests, forms, and committees free to weigh the sincerity of a request for exemption from vaccination on religious grounds.

MORE BRICKS IN THE WALL: FEDERAL COURT STRIKES DOWN ANOTHER CHALLENGE TO A COVID-RELATED MANDATE

On March 7, 2022, the United States District Court for the Northern District of New York ("NDNY") dismissed another challenge to the COVID-19 Vaccine Mandate promulgated by the New York State Unified Court System ("UCS"). In doing so, the NDNY also determined that the reasonable accommodation process utilized by the UCS to ascertain the legitimacy of employees' religiously-based exemption requests did not run afoul of the "Free Exercise Clause" contained in the First Amendment of the United States Constitution. *Ferrelli v. State of New York Unified Court System, et al*, 22-CV-0068 (LEK) (CFH).

United States District Judge Lawrence E. Kahn, who presided over the instant matter, relied upon the recent decisions in *Kane v. de Blasio, et al*, 19 F.4th 152 (2d Cir. 2021) and *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868 (2021), in support of the constitutionality of the UCS' Vaccine Mandate that had been issued in September 2021 ("UCS Mandate") because it was "neutral and generally applicable," and therefore satisfied the rational basis scrutiny. More importantly, in wrestling with a relatively new issue before the Courts concerning the constitutionality of the reasonable accommodation process, the NDNY determined that the UCS did "not create a system of individualized

exemptions and refused to extend it to religious hardships. Rather, they created a system of religious exemptions and refused to extend it to Plaintiffs on responses, or lack thereof, to a supplemental form." *Id.*, at p. 15-16.

Further, District Judge Kahn held that the supplemental form used by the UCS to ascertain the sincerity of the plaintiffs' religious beliefs satisfied rational basis scrutiny because the information being solicited in the supplemental forms "merely provide factual information about the use of fetal cell lines in creating vaccines and provides an opportunity to explain how their beliefs may have changed over time or how their beliefs distinguish the COVID-19 vaccines from other products" that have utilized fetal cell lines. According to the NDNY, this line of inquiry "does not presuppose the illegitimacy of concerns about use of fetal cell lines; it merely seeks to determine whether such concerns are the applicant's true motivation for seeking an exemption." *Id.*, p. 17. Moreover, District Judge Kahn opined that, even if the Court were to use the strict scrutiny standard, the UCS' use of the initial and supplemental forms related to their respective exemption requests "was narrowly tailored to the state's compelling interest" to stem the spread of COVID-19. *Id.*, at p. 18.

LIGHT PLEADING REQUIREMENTS LIFT NATIONAL ORIGIN CLAIMS AGAINST LAW FIRM, BUT PARTNER SLIPS AWAY

Former Chief Judge Coleen McMahon provided a comprehensive analysis of national origin discrimination claims under federal, state, and New York City law in *Mondelo v. Quinn, Emmanuel* etc., 21-CV-2512 (CM) (S.D.N.Y. February 22, 2022). Judge McMahon denied the law firm employer's motion to dismiss as to hostile environment, supervisor and firm liability, and retaliation. However, she granted the motion to dismiss aiding and abetting claims against a partner because the complaint did not allege that he harbored any bias against the plaintiff.

Nicholas Mondelo alleged he was the sole Hispanic/Spanish origin Regional IT Director at Quinn, Emanuel ("Firm") and that the Firm's IT Director, a longtime "untouchable" Eskanos, called him a "spic" and denied him the benefits and support to do his job afforded to all other Regional IT Directors, who were not Hispanic/Spanish. Mondelo alleges he complained to HR, and partner Peter Calamari was appointed to be a "buffer" but did nothing to hinder Eskanos' harassment of Mondelo. Plaintiff eventually suffered a nervous breakdown and was terminated. Mondelo sued under 42 U.S.C § 1981 ("Section 1981"), the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"), and the Firm moved to dismiss.

Judge McMahon first ruled that all of Mondelo's claims spanning 2015-2019 were timely under the "continuing violation" theory of unlawful harassment because at least one act of alleged harassment came within the applicable limitations period and all are treated as one unlawful practice using the timing of the last alleged act. Second, Mondelo sufficiently alleged a claim for harassment because the single slur of "spic" imputes animus to all the subsequent alleged adverse acts of unequal treatment. Similarly, the retaliation claim survives because the same acts of alleged employment sabotage

occurred after Mondelo complained to HR. Judge McMahon easily attributed Eskanos' alleged harassment and retaliation to the Firm since Eskanos was Mondelo's supervisor and HR allegedly did nothing to alleviate the situation after Mondelo complained. However, Judge McMahon was stricter as to individual liability against Calamari as an aider and abettor under the NYSHRL and NYCHRL. Under aider and abettor theory, the supervisor must share the discriminatory intent or purpose of the main actor. Mondelo's complaint did not allege any national origin or ethnic hostility by Calamari, and so the claim failed. Significantly, Calamari's failure to remedy Eskanos' harassment did not give rise to the requisite animus to make Calamari liable. "Because Mr. Calamari's failure to take remedial measures does not in and of itself establish aiding and abetting liability," Judge McMahon dismissed those claims.

NLRB CONFIRMS THAT STARBUCKS IS PRECLUDED FROM SUBMITTING EVIDENCE AT PRE-ELECTION HEARINGS IN SUPPORT OF ITS POSITION THAT SINGLE-STORE BARGAINING UNITS ARE INAPPROPRIATE

On March 16, 2022, the National Labor Relations Board ("NLRB" or "Board") denied Starbucks' request for review of a regional director order precluding it from submitting evidence at pre-election hearings in support of its position that single-store bargaining units are inappropriate and that multi-location units are the sole appropriate units.

The background to the evolving case is as follows: on February 1, 2022, Workers United ("Union") filed six representation petitions in NLRB Region 3, located in Buffalo, New York. The Region 3 Regional Director ("RD") consolidated the six petitions according to store location and set a strict deadline of February 11, 2022 at 12:00 p.m. for Starbucks to file its Statements of Position concerning all six petitions. Starbucks did not timely file, and in a February 18, 2022 Order, the RD held that pursuant to Rule 102.66(d) of the Board's Rules and Regulations, Starbucks would be precluded from introducing evidence to support its position concerning appropriate bargaining units.

On March 7, 2022, the RD affirmed those instructions in its Decision and Direction of Elections pursuant to the same regulation. The Order further explained that under *Dixie Belle Mills, Inc.*, 139 NLRB 629 (1962), "[a] single-facility unit is presumptively appropriate unless it has been so effectively merged or is so functionally integrated with other facilities that it has lost its separate identity." Moreover, the RD pointed out that in *Haag Drug*, the Board stated that "a single store in a retail chain, like single locations in multilocation enterprises in other industries, is *presumptively* an appropriate unit for bargaining." 169 NLRB 877, 877 (1968) (emphasis in original). Explaining that the employer bears a "heavy burden of overcoming the presumption," the RD concluded that Starbucks had not met that burden given that Starbucks had been "precluded from presenting evidence or argument with respect to the appropriateness of the proposed facility-wide units."

Starbucks requested review of the RD's order, arguing that it should not be precluded from presenting its unit objections for various reasons, including allegedly

minor filing delays and technical issues with Microsoft Outlook. As mentioned above, on March 16, 2022, the Board issued a short, one-line order denying Starbucks' request for review on the ground that Starbucks raised "no substantial issues warranting review." The Board's decision, though seemingly on procedural grounds this time, is consistent with its February 23, 2022, decision rejecting an earlier Starbucks challenge to a single-store bargaining unit in Mesa, Arizona. 371 NLRB No. 71. Despite these results, Starbucks has continued to challenge single-store units. Now facing more than 100 representation petitions for Starbucks locations nationwide, the Board may again return to this issue.

Notably, the Board's decision came a day after the Board's General Counsel issued a complaint against Starbucks, alleging that the company violated the National Labor Relations Act by "interfering with, restraining, and coercing employees" in Phoenix, Arizona.
