Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
May 6, 2022 Edition

JUDGE RAKOFF UPHOLDS PAINTERS' LAWFUL FREE SPEECH OVER NON-UNION CONTRACTOR'S CLAIMS OF SECONDARY PRESSURE

The prohibitions and penalties of "secondary boycotts" have long bedeviled union pressure campaigns. A union cannot coerce and harm one employer A to benefit the employees of a second employer B, as when A must cease using B unless B agrees to the Union's demands at B. But the line between such unlawful secondary activity and protected non-coercive publicity is often unclear, subject to a federal judge's subjective balancing. In *Cosmopolitan Interior NY Corp. v. District Council 9, Int'l Union of Painters*, Case No. 19-cv-2669 (JSR) (S.D.N.Y. April 25, 2022), U.S. District Court Judge Jed S. Rakoff walked that line with a tilt to First Amendment speech, finding that Painters District Council 9 ("Union" or "DC9") engaged in permissible publicity, not secondary pressure, against non-union contractor Cosmopolitan Interior NY Corp. ("Cosmopolitan").

Cosmopolitan engaged in double-breasting in order to stay non-union yet win union jobs by teaming up with a unionized contractor that acted as official "paymaster" for union workers sent to unionized worksites to perform Cosmopolitan work. When the Union discovered this strategy, it confronted the unionized paymaster Par Wall, threatening it with a grievance; warned primary contractor J.T. Magen ("Magen") that the Union might pull those workers from the job; and dispatched Scabby the Rat with Union pamphleteers to the NY Stock Exchange ('NYSE') to warn the public that Cosmopolitan paid less than prevailing wage. Soon after, Par Wall, Magen and NYSE ceased doing business with Cosmopolitan. Cosmopolitan sued, alleging DC9 engaged in a secondary boycott by coercing other employers to drop Cosmopolitan unless it signed the Union contract.

Judge Rakoff analyzed the secondary prohibitions of National Labor Relations Act ("NLRA") § 158(b) in three parts: (i) union threat, coercion or restraint; (ii) whether the Union's actions were for the benefit of the threatened employer's employees or for the employees of a secondary employer; and (iii) causation of harm by the Union. Following a full evidentiary bench trial, Judge Rakoff dismissed the case against the Union, finding alternatively that the Union's behavior was not coercive, was aimed to protect primary employees, did not cause Cosmopolitan to lose jobs, and in any event, was constitutionally protected publicity.

First, Judge Rakoff found that the Union's threat to grieve against "paymaster" Par Wall was lawful since "it is not an unfair labor practice for a union to threaten to enforce [its CBA with Par Wall] by taking a grievance to arbitration." In addition, Judge Rakoff credited Par Wall testimony that it would "most likely" have terminated Cosmopolitan in any event because the arrangement was always temporary. Second, the Union did not "cause" contractor Magen to oust Cosmopolitan from the job, despite the Union's warning it would pull its' glazier members, because Magen was dissatisfied with Cosmopolitan independently and was concerned about paint work, not glazier's work. Finally, Scabby

and his pamphleteers were primarily lawful speech enjoying the liberal protections of the First Amendment, ruled the Court. Cosmopolitan offered no evidence that the Union's message of Cosmopolitan paying below prevailing wage was untrue and NYSE vulnerability to bad publicity was part of the free persuasion that the Union could lawfully advance under NLRA section 158(b)'s publicity safe harbor. Accordingly, "the Court concludes that Cosmopolitan ... failed to prove its case with respect to DC9's broader pressure campaign against general contractors and end-user clients."

AMAZON CAN TEST SORTERS FOR CANNABIS UNDER NYC LAW

Amazon has been the object of negative news ever since losing an election for union representation to a grass roots, bottom up employee organizing effort at its Staten Island facility. However, a recent federal district court decision gives Amazon a big-win, holding that Amazon "Sortation Associates" at its Staten Island facility who work on conveyer belts can be tested for marijuana and lose job offers if they test positive. *Thomas v. Amazon.com,Inc.*, Case No. 1:21-cv-01325 (E.D.N.Y. April 12, 2022).

Several plaintiffs received offers of employment to work in Sortation Associate positions in Amazon's Staten Island facility, but Amazon withdrew those offers when plaintiffs tested positive for the presence of marijuana against Amazon policy. Plaintiffs sued alleging that Amazon violated New York City Administrative Code § 8-107(31) that makes it an unlawful discriminatory practice "to require a prospective employee to submit to testing for any tetrahydrocannabinols or marijuana" as a condition of employment.

U.S. District Judge Brian Cogan granted Amazon's motion to dismiss because it was undisputed that plaintiffs worked with conveyor belts that qualified as "heavy machinery" that could cause "immediate risk of death or serious physical harm ...," both exemptions to the New York City law. Under these circumstances, it "isn't hard to imagine," explained Judge Cogan, "a multitude of ways a marijuana-impaired employee could cause accidents ...". It therefore "makes perfect sense that the law would exempt such workers from a drug test prohibition ...", he reasoned. It also made perfect sense, therefore, for the Court to grant Amazon's motion and to dismiss the case.

SHORTLY AFTER HISTORIC WIN, AMAZON UNION SUFFERS DEFEAT AT SECOND LOCATION

Less than a month after an election win at an Amazon warehouse, the Amazon Labor Union ("ALU" or the "Union") suffered a defeat at a nearby sorting facility known as LDJ5. The vote tally was 618 against the Union and 280 for the Union. This result creates a potentially awkward scenario in which the large Staten Island warehouse workers have Union representation, while the complementary sorting facility does not. The result was also somewhat surprising when compared to the relatively decisive warehouse victory of 2,654 for the Union to 2,131 against the ALU.

ALU founder Chris Smalls said, "Despite today's outcome I'm proud of the worker/organizers of LDJ5. [T]hey had a tougher challenge after our victory at JFK8." Smalls added that the ALU "will continue to organize and so should all of you."

Unlike the warehouse, where workers pick and package merchandise at a rate of 300-400 items per hour, the sorting facility workers sort the packaged items by geographic regions. Perhaps significantly, the first campaign focused on wages, working conditions, and breaks, while the focus of the sorting facility campaign was giving workers more hours and shifts.

The original Union victory at the warehouse is being appealed by Amazon to the National Labor Relations Board. ("NLRB"). The NLRB has scheduled a hearing for May 23, 2022 to address Amazon's objections. Conversely, the ALU has also indicated that it plans to challenge Amazon's win at LDJ5.

NEW YORK PRESBYTERIAN HOSPITAL FINALLY AGREES TO PARTCIPATE IN PROGRAM FOR LONG TERM VICTIMS OF 9-11

The World Trade Center Health Program was established in 2010 with a goal of providing screening and treatment for those exposed to toxic conditions after 9-11 and suffering from, among other conditions, respiratory diseases, digestive diseases, various forms of cancer, and other diseases caused by exposure to the post 9-11 toxic environment. The goal was saving these victims from the bureaucratic and logistical problems of treating long term conditions through private insurers. Virtually every major hospital in the New York area participated in the program, except New York Presbyterian Hospital.

Those treated for these conditions at NYP have been forced to pay for many treatments out of pocket or through private insurance with large co-payments and deductibles. Despite its refusal to participate in the program, as recently as last year, NYP representatives have responded to Congressional inquiries that no such problem exists. Finally, last week NYP signed a Master Agreement to participate in the program to allow for easy access for WTC Health Program Members in the future. In addition, NYP agreed to reimburse those who were improperly charged co-pays at NYP for 9-11 related services.

FIRST CIRCUIT COURT OF APPEALS UPHOLDS MASSACHUSETTS HOSPITAL SYSTEM VAX MANDATE

In a victory for vaccine advocates, last week the United States Court of Appeals for the First Circuit ("First Circuit") affirmed a District Court decision rejecting hospital workers' claim that the Massachusetts General Hospital ("MGB") system could not mandate COVID-19 vaccinations over their religious objections as a condition of continued employment. Eight unvaccinated employees had challenged the mandate and sought a preliminary injunction to block its enforcement. All had sought religious exemptions from the vaccine mandate that were denied. MGB placed the employees on unpaid leave and later fired six of them (one of the remaining employees quit while the

other ultimately was vaccinated). *Together Employees et al. v. Mass General Brigham Inc.*, Case No. 21-1909 (1st Cir. 2022)

The First Circuit upheld United States District Court Judge Dennis Saylor IV's October 2021 ruling which held that the eight workers had not proven that they had suffered irreparable harm sufficient to justify the issuance of an injunction against MGB's vaccination mandate. The First Circuit held that the vaccine mandate did not require any of the employees to perform or abstain from any action that violates their religious beliefs. The Court observed "MGB is not requiring appellants to be vaccinated involuntarily. Instead, because [they] have refused to get vaccinated, they have been fired." While the resulting loss of income undoubtedly harms the appellants, like virtually every Court, this court found that monetary loss is not irreparable. Moreover, the Court held that whatever emotional distress resulted was not "irreparable." Ultimately, the First Circuit believed that the plaintiffs' arguments were the same insufficient claims they made at the District Court. The workers "made virtually no effort to show irreparable harm," the Court wrote, "Instead, they largely repeated their prior unsuccessful arguments."

The First Circuit decision was in line with a United States Supreme Court decision from earlier this year in which the Court upheld the U.S. Department of Health and Human Services' interim rule requiring covered health facilities that treat Medicare and Medicaid patients to ensure their staff are vaccinated against COVID-19.

Legal Advice Disclaimer: The materials in this **Client Alert** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client–attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **Client Alert**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.