Labor & Employment Issues
In Focus

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THIRD CIRCUIT REVERSES NLRB OVER "SALT MINE" TWEET

On May 20, 2022, the United States Circuit Court of Appeals for the Third Circuit in Philadelphia reversed the National Labor Relations Board's ("NLRB") ruling, finding that a tweet by the publisher of the right-wing online publication *The Federalist* was not a threat but rather in the realm of a joke or, according to the concurrence, "farce," and therefore did not violate the National Labor Relations Act's ("NLRA") prohibition on threats of reprisal for union activity. *FDRLST Media LLC v. NLRB*, No. 20-3434 (3d Cir. 2022)

A Third Circuit panel of three judges, appointed by Presidents Trump, Reagan, and George W. Bush, respectively, applied First Amendment principles aggressively to the realm of labor management relations. Specifically, on June 6, 2019, unionized employees of Vox Media, a left-leaning digital media company, struck during contract negotiations. That same day, Ben Domenech, executive officer of FDRLST Media and publisher of *The Federalist*, posted a tweet from his personal Twitter account which read: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Domenech has over eighty thousand followers. At the time, the *Federalist* had seven employees, six of whom were writers and editors. At least one employee viewed the tweet, but the record did not reflect that any employee expressed concern over its message.

On June 7, 2019, a Massachusetts resident, Joel Fleming, who had no connection with the *Federalis*t, independently filed an unfair labor charge with Region 2 of the NLRB in Manhattan. The charge alleged that Domenech's tweet violated Section 8(a)(1) of the NLRA. After investigating the charge and the underlying tweet, the NLRB determined that it constituted a threat of reprisal. The Third Circuit vehemently disagreed. "An employer is not barred from communicating his views on unions—even his anti-union views—to his employees, but he cannot threaten employees with reprisals or promise them benefits in relation to unionization. But what constitutes a prohibited 'threat'? To qualify as such, an employer's statement must warn of adverse consequences in a way that 'would tend to coerce a reasonable employee' not to exercise her labor rights." The Court then determined that in context of a small media company, the brief tweet regarding "salt mines" was clearly "farcical," "comical," and not a threat. Rather, the Court held that a "reasonable FDRLST Media employee who became privy to Domenech's tweet—posted the same day as the Vox Media walkout—would be far more likely to view the tweet as 'commentary on a contemporary newsworthy and controversial topic[]' than as a threat that implicated her status with the Employer…."

The Court continued its analysis by placing the tweet in the context of humor often being situational: "Excluding context and viewing a statement in isolation, as the Board did here, could cause one to conclude that 'break a leg' is always a threat. But when

expressed to an actor, singer, dancer, or athlete, that phrase can reasonably be interpreted to mean only 'good luck.'"

The Court also found that the NLRB failed to note that there was no evidence of any Federalist employee finding the tweet threatening, concluding that as the charge was filed by a non-employee, the tweet was "pure speech, and the meaning of the employer's statement is open to question, the "silence of the record" is significant and should have been considered."

Importantly, the NLRA distinguishes prohibited employer conduct from protected employer speech in Section 8(c), which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter [29 U.S.C. §§ 151–169], if such expression contains no threat of reprisal or force or promise of benefit." Thus, this Section implements the First Amendment. It also is worth noting that the Court recognized the NLRB's broad jurisdiction to hear charges, even when brought by unrelated third parties.

While the case was decided on limited, specific facts, the decision gives an important insight into the Federal Courts' ongoing wrestling with the issue of the First Amendment as applied in labor disputes.

UNITED STATES WOMEN'S NATIONAL SOCCER TEAM FINALLY ACHIEVES PAY EQUITY

After years of litigation, and decades of outperforming their male counterparts on the pitch, the United States Women's National Soccer Team ("USWNT") has finally reached an agreement with the sport's domestic governing body, U.S. Soccer, to provide for pay equity between the Men's and Women's teams. After using the different language in the teams' respective collective bargaining agreements ("CBAs") and the fact that the international soccer federation ("FIFA") provides far bigger bonus pools for the Men's World Cup as opposed to the Women's World Cup, as excuses for avoiding pay equity, U.S. Soccer finally agreed to equal pay pools for both teams after receiving an assist from the Men's team, as they agreed to share the men's games larger bonus pool.

The new, matching CBAs, which run through 2028, thus two World Cup cycles, equalize World Cup prize money, clearing the obstacle which had perpetuated inequality and still does in other national team arrangements. The new CBAs most importantly no longer place the two teams as competing with each other for resources and instead place them together trying to popularize the world game and help each other financially in the process.

The new CBAs come on the heels of the recent settlement of a gender discrimination and pay equity suit brought by several prominent members of the women's team representing a class against U.S. Soccer. The settlement netted the women $24 million, and came with a promise of equal pay, which is brought to life by the CBAs.

Perhaps not coincidentally, U.S. Soccer is currently run by President Cindy Parlow Cone, a former USWNT player and World Cup and Olympic Champion.

For their part, several United States Men's National Team ("USMNT") players had been advocating for this arrangement, despite the possible loss of income for them, at least in the short term. Walker Zimmerman, a USMNT defender and players' association leader, acknowledged that, for the men, "there was a potential chance of making less money. No doubt about it. But we also believe so much in the women's team, we believe in the whole premise of equal pay. And ultimately, that was a big driving force for us."

The biggest change in the USWNT CBA will be that the team is paid for play, as opposed to the prior system of guaranteed salaries for certain, top players, and as the USMNT has been paid for many years. In addition, the players will earn bonuses for wins and draws. Most importantly, the USMNT and the USWNT agreed to share World Cup prize money, bridging a gap that FIFA has refused to close. FIFA rewarded men's teams at the 2018 World Cup with a total of $400 million based on their performance. The winner, France, received $38 million. The entire pot at the 2019 Women's World Cup was $30 million. The USWNT received $4 million for winning. Now, under the new agreement, the parties will pool all prize money they earn from the 2022 Men's and 2023 Women's World Cups and distribute 90% of it equally among the men's and women's teams. The federation will keep the other 10%. In 2026 and 2027, those shares will be 80% and 20%. A similar model will apply to non-World Cup events and other federation revenue.

Perhaps less tangibly, but no less important, the teams will have equal working conditions, including equal quality venues, playing surfaces, practice and training facilities, coaching staffs, medical staff, and travel and accommodation budgets. In the other direction, the USMNT will now receive similar childcare arrangements as the USWNT.

NEW YORK STATE SUES AMAZON OVER MISTREATMENT OF DISABLED WORKERS

On May 18, 2022, the New York State Division of Human Rights ("Division"), the State agency delegated with the authority to enforce the New York State Executive Law § 290 *et seq.*, commonly known as the New York State Human Rights Law ("SHRL"), filed a confidential discrimination complaint against e-commerce giant Amazon ("Complaint"). The Complaint accuses Amazon of unlawfully forcing pregnant and disabled workers to take unpaid medical leaves of absence regardless of whether alternative reasonable

accommodations existed, and seeks as a remedy civil fines and penalties of up to $100,000 per violation, improved training, and new policies for reviewing requests for reasonable accommodations.

The SHRL protects workers from discrimination on the basis of, among other things, disability and pregnancy, and provides broader protections than its federal corollaries – the Americans with Disability Act and the Pregnancy Discrimination Act. Generally, the SHRL requires employers to engage in a cooperative dialogue and provide reasonable accommodations for employee disabilities. To this end, Amazon employs so-called "accommodation consultants" to evaluate requests for disability- or pregnancy-related accommodations as required by the SHRL. However, Amazon simultaneously maintains a policy that permits managers to override consultant recommendations. The Complaint involved accusations that Amazon forced a pregnant employee to continue lifting packages over 25 pounds against medical restrictions and after she was injured it unilaterally put her on an indefinite unpaid leave of absence. In some instances, rather than adopting the consultant's recommendation of permitting disabled workers to continue working with a reasonable accommodation, which the consultant noted would allow the person to continue performing the core duties of their job without imposing an undue burden on the company, according to the Complaint, Amazon supervisors would object and decline the recommendations and instead force employees to take leaves of absence. In another case, an Amazon worker's supervisor denied a schedule modification for a sleep-related medical condition even though the worker had submitted medical documentation supporting it, had been trading shifts with a colleague without incident, and the swap was recommended by a consultant.

According to Governor Hochul, her "administration will hold any employer accountable, regardless of how big or small, if they do not treat their workers with the dignity and respect they deserve." She added: "New York has the strongest worker protections in the nation and was one of the first to have protections for workers who are pregnant and those with disabilities. Working men and women are the backbone of New York, and we will continue to take a stand against any injustice they face."

Growing concerns over Amazon's treatment of its workers have also led to, as we have covered in prior editions of *In Focus*, highly publicized union organizing drives with recent success at one of its Staten Island distribution centers. Additionally, last September, six Democratic senators including New York's Kirsten Gillibrand wrote a letter calling on the U.S. Equal Employment Opportunity Commission to investigate Amazon's alleged "systemic" failure to accommodate pregnant fulfillment center workers stemming from allegations that the retaiiler failed to shield pregnant workers from physically strenuous tasks. More recently, the retailer has been the target of litigation by State Attorney General Letitia James, though on May 10, 2022, the State Supreme Court Appellate Division for the First Department dismissed as preempted by Federal law the lawsuit which alleged that Amazon committed health and safety violations at its City

based fulfillment centers. *New York v. Amazon.com et al*, 2022 NY Slip Op 03081 (1st Dep't 2022).

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