Labor & Employment Issues
In Focus
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For Clients and Friends
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SPLIT SECOND CIRCUIT NARROWLY APPLIES NYC ANTI-HARASSMENT RETALIATION RULES

A recent decision of the U.S. Court of Appeals for the Second Circuit narrowly applies the protections against retaliation provided by the New York City Human Rights Law ("NYCHRL") in a case where a passenger called a female African American flight attendant a "black bitch," the attendant complained to the flight's captain, he removed her from the flight, and she was terminated shortly thereafter. *LeRoy v. Delta Airlines, Inc*., No. 21-267 (2d Cir. June 9, 2022).

Clara LeRoy worked as a flight attendant for Delta Airlines with an unblemished 17-year record. On May 18, 2017, a disgruntled passenger called LeRoy a "black bitch" at boarding. LeRoy immediately complained to the pilot, Captain Carns, who ordered her to "step out on the bridge with the passenger." When LeRoy refused, Carns had her removed from the flight. About a month later, LeRoy complained to another supervisor. The next day, Delta required LeRoy to take a drug test, suspending her pending the result. Delta fired LeRoy 17 days later, though she alleges "there were no drugs in her system." LeRoy sued Delta in Brooklyn State Court under the NYCHRL. Delta removed the case to federal court, and the district court granted Delta's motion to dismiss her action for failure to state a claim.

Applying a tight, technical legal reading of the NYCHRL, a split 2:1 Second Circuit panel agreed with the district court and affirmed dismissal. Judge Menashi joined by Judge Walker restated the basic principles of a retaliation claim, that plaintiff suffer an adverse employment action because she engaged in protected activity, such as complaining of conduct prohibited by the NYCHRL, or alternatively, that she had a good faith, reasonable belief the conduct was prohibited. Judges Menashi and Walker first determined that the passenger's racist/sexist comment did not constitute prohibited activity because it was a single incident of one comment by a customer that Delta could neither anticipate nor control. On the same basis, the Court concluded that LeRoy could not reasonably believe she was complaining about unlawful activity. Similarly, Captain Carn's order and removal of LeRoy was not and could not reasonably be seen as an unlawful Delta response, reasoned the Court, because Delta was not required to remove the passenger in a first incident. Accordingly, since the Court saw no actual or reasonably believed unlawful activity by Delta, the Court found no prohibited retaliation under the NYCHRL in Delta terminating LeRoy two months after her first complaint.

Judge Bianco dissented, accusing the majority of applying too restrictive a reading of the NYCHRL's expansive protections. The majority's holding, he criticized, creates a new rule that if a single harassing comment is not severe enough to create a hostile work environment in the first instance, an employee must endure further harassment before she can be protected in reporting the behavior - a scenario contrary to the NYCHRL's policy and intent. Second, Judge Bianco asserted that LeRoy's supervisor, Captain

Carns, should have taken "some other appropriate remedial action." Though the majority questioned "what that remedial action might have been," standard anti-harassment practice under the NYCHRL or even Title VII is clear-a manager, not the victim, should confront the racist customer. It was perfectly reasonable for LeRoy to expect that Captain Carn, as Delta's manager, confront the passenger to protect her, rather than order her to the bridge alone to face the man who called her a "black bitch."

NLRB RULES THAT PETITIONS TO REMOVE UNIONS MAY BE BLOCKED BASED ON MERITS OF NLRB CHARGES

In a decision issued on June 15, 2022, the newly Democratic and Union-friendly National Labor Relations Board ("NLRB") has ruled that a petition to decertify a union may be dismissed pending the resolution of charges of serious and widespread unfair labor practices. *Rieth-Riley Construction Co., Inc.,* 371 NLRB No. 109. So-called "Blocking Charges" had been a mainstay in the Union toolbox to delay elections allegedly tainted by employer unfair practices before the Trump-era Board acted to curtail them.

In response to a series of unfair labor practices, in mid-2019, employees of Rieth-Riley Construction who were represented by Local 324 of the International Union of Operating Engineers ("IUOE") went on strike. On March 10, 2020, a member of Local 324 filed a decertification petition. As the unfair labor practice charges were still pending, the Acting Regional Director held the petition to decertify in abeyance, despite the new Trump era Election Protection Rule, which was intended to require elections even with pending unfair labor practices charges, as that rule would not take effect until July 31, 2020. In response, the employee filed a new petition to decertify on August 7, 2020 and that petition went to a mail ballot election in compliance with the new rule. However, as the new rule was silent on a "merit-determination dismissal," where the employer's conduct and the subsequent charges against it allegedly led to the petition to decertify, the Acting Regional Director concluded that dismissal of the petition was still appropriate.

The NLRB in rare unanimity held that "merit determination dismissals" still existed, that such blocking charges were still to be considered, and elections on decertifications could be delayed under those circumstances. Unlike automatic blocking charges which were themselves blocked by the Trump era rule, "merit determination dismissals" are based on the Regional Director's determination that the charges have substantive merit and are so serious that the election would ultimately be invalidated. The Board held that this was in keeping with decades long Board practice. However, by a 3-2 party line vote, the Democratic members upheld the Regional Director's application of the merit determination dismissal to the facts, rejecting hearings as unnecessary, and precluded in any event in light of the Regional Director seeking a bargaining order, while the Republican members dissented, finding that a merit determination dismissal should not apply without a fact hearing on whether there was a "causal nexus" between the alleged unfair labor practices and the loss of employee support. Despite the return to partisan policy on application, the Board's affirmance that merit blocking charges are alive and well is welcome news to the labor movement, especially as unions ramp up their organizing efforts.

FIRST APPLE STORE FALLS FROM THE TREE, VOTING FOR UNION REPRESENTATION

Joining a growing national organizing trend across technology, retail, and service industries, employees of an Apple, Inc. store in Towson, Maryland, voted on June 18, 2022, by a nearly 2-to-1 margin in an election run by the National Labor Relations Board ("Board"), for the International Association of Machinists and Aerospace Workers ("IAM") as their bargaining representative. Of 110 eligible unit voters, 65 chose IAM and 33 opposed.

Though the Board must still certify the results, the workers expressed in a statement to Apple CEO Tim Cook that their driving motivation was to seek "rights we do not currently have." Recent highly publicized union organizing campaigns have succeeded in establishing labor organizations to represent workers employed by house-hold company names such as Amazon, Starbucks, outdoors retailer REI, and Google parent company Alphabet. Whether this trend continues, and whether first contracts are ever reached, will likely shape union organizing nationally in the months ahead.

D.C CIRCUIT EXPANDS SCOPE OF TITLE VII

On June 3, 2022, an *en banc* panel of the United States Court of Appeals for the District of Columbia Circuit expanded the scope of Title VII anti-discrimination laws to cover decisions made by employers in the context of internal company transfers. In *Chambers v. District of Columbia,* D.C. Cir. No. 19-07098, D. C. Circuit *en banc*, (6/3/22), a full Court ruled that a litigant could file a claim for discrimination where his or her employer turned down a request for a transfer while preferring another employee for reasons which fall within a protected category even if the plaintiff could not show "objectively tangible harm."

The Plaintiff, Mary Chambers, worked in the District of Columbia Office of the Attorney General for over 20 years. She sought numerous transfers to different units in the office but never got the job. She ended up filing a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that similarly situated male employees had been granted transfers like the ones she had been seeking. Under a 1999 D.C. Circuit case, *Brown v. Brody,* the Court had held that the denial or forced acceptance of a job transfer is actionable under Title VII only if the employee could prove he or she suffered "objectively tangible harm." Under this standard, the district court stated that even if the denial of her transfers had been motivated by sex discrimination, Chambers had not proven the harm required, so the court granted summary judgment for the defendant. Chambers appealed and the initial three judge panel ruled that it was bound by *Brown* and affirmed the summary judgment. However, in a somewhat unusual move, the Court decided to hear the case *en banc*.

The full court considered the case through the prism that nowhere does Title VII actually list a requirement that the alleged discriminatory act cause "objectively tangible harm." Thus, the plain meaning of the statute was considered and the full court held that refusing an employee's request for a transfer while granting a similar request to a similarly situated coworker is treating one employee worse than the other. If the decision is based on a protected class, then the "analysis is complete." The court disregarded the argument that allowing this type of litigation would result in *de minimus* employment decisions being highly litigated. Instead, the Court insisted on the fact that Title VII does not include such a standard of proof. The dissenters aggressively noted this omission arguing that the Plaintiff's claim was just such a *de minimus* issue that should not give rise to a Title VII lawsuit.

Interestingly, both Plaintiff Chambers and the D.C. government argued that *Brown* should be struck down, thus resulting in the Court inviting Counsel Zachary Schauf of Jenner & Block to represent the existing precedent. The *en banc* decision then referenced Counsel's concession at oral argument that an employer putting out donuts for workers under a sign that read "Whites only" would not meet the tangible harm threshold from *Brown*. "That alone shows just how much the textual requirement of 'objectively tangible harm' frustrates Title VII's purpose of ending discrimination in the workplace," the Court said. Therefore, imposing a requirement that a worker show harm beyond just a biased transfer decision is inappropriate to protect employers from small claims under Title VII, the Court ruled.

The Court's ruling that decisions that change an employee's position can be an adverse employment action and therefore covered by Title VII, even without tangible harm, adds to a split in the Circuit Courts of Appeals as the Fourth, Fifth and Eleventh Circuit Courts of Appeal largely agree with the D.C. Circuit approach while the Sixth and Seventh Circuits disagree. This disagreement in the Circuits may therefore result in United States Supreme Court review, particularly as the D.C. Circuit panel was split almost completely along partisan lines-six Democratic appointed judges joined by one Republican appointed judge on the majority side and four Republican appointed judges, including three appointed by the last president, dissenting. Judges David Tatel, a Clinton appointee, and Douglas Ginsburg, a Reagan appointee, wrote for the Court.

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