Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
July 6, 2022 Edition

SCOTUS PERMITS TEXAS TO BE SUED FOR EMPLOYMENT DISCRIMINATION UNDER USERRA

Last week, the Supreme Court of the United States ("SCOTUS" or Court") breathed new life into an employment discrimination lawsuit initiated by former U.S. Army Reservist, Le Roy Torres, under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). *Torres v. Texas Dept. of Publ. Safety*, Case No. 20-603 (June 29, 2022). The plaintiff's civil action had been dismissed by a Texas intermediate, appellate court, based upon a motion by the State of Texas ("State"), arguing that the legal maxim of sovereign immunity precluded the plaintiff from advancing his case against the State. SCOTUS disagreed with the lower court's interpretation of sovereign immunity, given the Court's recent decision in *PennEast Pipeline Co. v. New Jersey*, 594 U.S. ___ (2022), and remanded the matter to the State's court for further proceedings.

In 2007, Mr. Torres, a reservist with the U.S. Army since 1989, was called into active duty status and deployed to Iraq. While on orders during Operation Iraqi Freedom ("OIF"), Mr. Torres was "exposed to toxic burn pits, [which] is a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment." *Torres*, p. 2. As a result of this exposure, Mr. Torres returned from his service "with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult." *Torres*, p. 3. Further, his medical condition rendered him unable to perform the functions of a State trooper, which was his job prior to his deployment in 2007. Even though Mr. Torres requested that the Texas Department of Public Safety ("Employer") reemploy him in a different capacity that accounted for his constrictive bronchitis, his Employer refused. Accordingly, Mr. Torres initiated this civil action against the Employer for its failure to comply with USERRA's statutorily-created mandate that "state employers rehire returning servicemembers, use reasonable efforts to accommodate any service-related disability, or find an equivalent position (or its nearest approximation) where such disability prevents the veteran from holding his prior position." *Id.* (internal quotations omitted).

In the decision authored by now-retired Justice Stephen Breyer, the Court determined that the U.S. Constitution permits the enforcement of federal reemployment protections codified in USERRA by authorizing private litigation against noncompliant state employers that do not wish to consent to suit. Under the concept of sovereign immunity, courts may not ordinarily hear civil actions brought by a person against a nonconsenting state actor. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). However, states are open to civil litigation if the states "agreed their sovereignty would yield as part of the plan of the [constitutional] Convention," thereby indicating consent to the abrogation of their sovereignty. *PennEast*, at 15 and 23. SCOTUS then reasoned that the State, by joining the Union and agreeing to be bound by the U.S. Constitution's empowerment of the federal government to "raise and support Armies" and

to provide and maintain a Navy," U.S. Const. Art. I cls. 12-13, knowingly agreed to a diminishment of its sovereignty in deference to federal laws designed to effectuate these constitutional mandates.

Then turning to the applicable provisions of USERRA, the Court determined that this statute's text is clear because USERRA expressly supersedes any attempt by states to block attempts to enforce this federal legislation. The federal authority to raise and maintain a military force is "complete" and therefore indicates that the State consented to the abrogation of its sovereignty. Further, SCOTUS ruled that "an assertion of state sovereignty to frustrate federal prerogatives to raise and maintain military forces would be strongly *contradictory and repugnant* to the constitutional order." *Torres*, p. 13 (*citing* The Federalist No. 32, at 200 (A. Hamilton). In dismissing the contention of the dissent, authored by Justice Clarence Thomas, the Court hypothesized that adopting the State's arguments could create a significant crisis. States that object to a military operation, such as OIF, could render Congress powerless to raise and maintain military forces, thereby "potentially debilitating" national security interests. *Torres*, p. 16

SCOTUS DECLINES NY HEALTHCARE WORKERS'
<u>REQUEST TO CHALLENGE VACCINE MANDATE</u>

On June 30, 2020, the Supreme Court of the United States ("Supreme Court") denied the workers' petition for a writ of certiorari from a decision by the U.S Court of Appeals for the Second Circuit ("Second Circuit") upholding New York's vaccine mandate without a religious exemption for healthcare workers. Justices Thomas, Alito and Gorsuch dissented. *Dr. A., et al. v. Kathy Hochul, Governor of New York, et al*., 597 U. S. ____ (2022). The Supreme Court's majority declined the opportunity to provide analysis or rationale, and at least for now, the dissenters' concerns regarding whether such constitutional claims are subject to the highest level of judicial strict scrutiny will remain unaddressed.

By way of background, on July 28, 2021, then-New York Gov. Andrew Cuomo announced that patient-facing healthcare workers at state-run hospitals would be subject to mandatory COVID-19 vaccination no later than September 6, 2021. Consistent with said announcement, on August 18, 2021, then-Commissioner Howard A. Zucker of the State Department of Health issued an Order for Summary Action ("DOH Order") mandating the COVID-19 vaccine for most healthcare workers, unless the worker successfully obtained a medical and/or religious exemption. Five days later, the State Public Health and Health Planning Council ("PHHPC") adopted emergency regulations ("Mandate") expanding the scope of healthcare personnel covered by the DOH Order, and, in a last minute change, removed the religious exemption. *See* 10 N.Y. Admin. Code § 2.61 (2021). Thereafter, 16 State healthcare workers challenged the Mandate as violating their constitutional rights for failing to consider religious exemptions by filing emergency applications in two federal courts seeking injunctive relief.

On September 12, 2021, District Judge William F. Kuntz of the U.S. District Court for the Eastern District of New York ("EDNY") rejected their application without issuing a

formal decision. By declining the workers' request, the EDNY reinforced the existing decisional law with respect to similar challenges to vaccine mandates that equipped a State with broad police power to pass laws that restrict religious protections, while simultaneously permitting secular conduct that undermines the government's asserted interests, *i.e.*, suggesting that a healthcare worker with a religious claim who remains unvaccinated undermines the State's asserted public health goals in ways greater than a similarly situated worker with a medical exemption claim.

On October 14, 2021, the U.S. District Court for the Northern District of New York ("NDNY") granted a state-wide preliminary injunction finding that the plaintiffs were likely to succeed on their claim that the Mandate violated, among others, the Free Exercise Clause of the First Amendment. 2021 WL 4734404, *8 (N.D.N.Y. Oct. 12, 2021). The Free Exercise Clause requires a law that burdens religious practice and is not neutral or of general application to satisfy the most rigorous form of constitutional "strict scrutiny." In order to obtain the more easily satisfied "rational basis" review, government officials cannot treat religious exercises worse than comparable secular activities. The NDNY held that the Mandate was neither neutral towards religion nor generally applicable, and thus, required the State to establish that the Mandate was narrowly tailored to serve a compelling government interest under strict scrutiny review, which the court found it did not. The injunction granted by the NDNY temporarily barred the State from requiring employers to deny requests for religious exemptions to the Mandate or to rescind any previously granted religious exemptions.

The decisions by the EDNY and NDNY were appealed to the Second Circuit. On November 4, 2021, a three-judge panel issued a 50-page opinion vacating the NDNY's preliminary injunction and affirmed the EDNY's denial. *See We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 288 (2d Cir. 2021) (*per curiam*) (finding that the plaintiffs failed to satisfy the first prong of the injunctive relief standard, likelihood of success on the merits, because the "undeveloped" record could not establish that the Mandate's requirements are not "generally applicable"); *see also We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 368, 370 (2d Cir. 2021) *(per curiam*) (clarifying that the claims arising from alleged violations of Title VII of the Civil Rights Act of 1964 do not satisfy the first prong of the injunctive relief standard because "Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer," only that it provides an accommodation that does not create an undue hardship to the employer's business).

On December 13, 2021, the Supreme Court denied the plaintiffs' request for emergency review to reverse the Second Circuit while the plaintiffs awaited the decision issued this week, *Dr. A. v. Hochul*, 595 U. S. ___, ___ (2021). Since December 2021, all but one of the plaintiffs has been terminated, "forced to resign, lost admitting privileges, or been coerced into a vaccination." 597 U. S. ____ (2022).

FEDERAL DISTRICT COURT GIVES ARBITRATION AWARD PROBATIVE EFFECT IN GRANTING SUMMARY JUDGMENT AGAINST FEDERAL, STATE AND CITY HARASSMENT, DISCRIMINATION AND RETALIATION CLAIMS

In *Del Villar v. Hyatt Hotel Corp.*, SDNY No. 19-cv-10891 (JMF) (June 28, 2022) federal district court Judge Jesse Furman granted Hyatt Hotel Corp., operating the Hyatt Centric Times Square ("Hyatt"), summary judgment dismissing the sexual harassment, discrimination, and retaliation claims of Room Attendant Angela Del Villar under Title VII of the Civil Rights Act of 1964 ("Title VII"), the New York State Human Rights Law ("SHRL") and the New York City Human Rights Law ("CHRL"). Notably distinguishing this decision is the outsized role played by the hotel industry - union arbitration process in the Court's analysis and conclusions.

Del Villar worked as a Room Attendant at Hyatt with an "unblemished record" for 10 years. However, during the later few years, and unknown to Hyatt, Engineer Neal Francois repeatedly verbally and physically harassed Del Villar, culminating in his grabbing and attempting to kiss her in a closet from which she escaped. Del Villar did not report the incident or longtime harassment. Two days later, Francois called Del Villar and other Room Attendants "blue shirts" after their uniforms, which Del Villar and the others disliked. When Francois said they could call him a "black shirt" after his uniform, Del Villar retorted: "[Y]ou wouldn't like it if I called you [n-word], but I don't." Francois immediately reported the slur to HR and Hyatt fired Del Villar. However, during her interviews with HR, Del Villar recounted Francois' sexual harassment of her. Hyatt investigated and fired Francois.

Both workers grieved through their Union to arbitration before the industry arbitrator. Following hearing with counsel, the arbitrator sustained the discharge of Francois for sexual harassment. He also found that Del Villar had called Francois "N" but ruled her termination "unwarranted" in light of "the high level of stress she was working under due to Francois' relentless sexual harassment." On reconsideration, the arbitrator imposed a 30-day suspension on Del Villar to "send a message that, whatever the circumstances, uttering racial epithets at work will not be tolerated." Both employees sued each other, and Hyatt, bringing the matter on removal to a fascinated Judge Furman.

The Court first held that though the arbitrator's factual and legal findings were not "preclusive" on Del Villar's statutory claims, as a matter of *res judicata* or collateral estoppel, he could and would give them "probative" weight on summary judgment. Applying this standard, fully citing colorfully from the awards, Judge Furman dismissed Del Villar's sexual harassment claims against Hyatt because Hyatt had an anti-harassment and reporting procedure known to Villar but there was no evidence in arbitration or discovery that Del Villar had ever reported the harassment to Hyatt before her exit interview, nor that Hyatt should reasonably have known of Francois' misconduct since "when there was a manager present, he would not harass me." Next, Judge Furman dismissed both Del Villar's discrimination and retaliation claims. Del Villar had argued that the arbitrator's findings of harassment by Francois, and his ruling her discharge "unwarranted" made discrimination and retaliation more than likely but Judge Furman

disagreed. Citing the same arbitrator's findings, Judge Furman stressed that Del Villar had used the "N" word, the importance of Hyatt "sending a message" as recognized by the arbitrator in imposing a suspension, and the legal fact that such language constituted a legitimate non-discriminatory reason for discharge, unrebutted by any pretextual evidence that discrimination or retaliation was Hyatt's real motive. Accordingly, under Title VII, the SHRL or CHRL, Del Villar's action against Hyatt was dismissed.

Del Villar illustrates the benefits of collective bargaining arbitration to an employer even without the formal preclusive effect of other forums or express language. Hotel industry arbitration provided the Court with a detailed picture of the workplace, including Hyatt's personnel procedures amid real-life employee interaction, as well as its normative judgments, all of which Judge Furman gave probative weight in awarding Hyatt summary judgment. Thus, while the Court ordered Del Villar and Francois to trial, Hyatt would not be there as a party.

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