Labor & Employment Issues
IN FOCUS

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For Clients and Friends
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SECOND CIRCUIT UPHOLDS WIN FOR NEW YORK CITY TRANSIT AUTHORITY AND MANHATTAN AND BRONX SURFACE TRANSIT AUTHORITY

On August 19, 2022, the United States Circuit Court for the Second Circuit ("Court" or "Second Circuit") affirmed a lower court's decision dismissing discrimination claims brought by a plaintiff who alleged he was denied employment because he was "profoundly deaf" and communicates primarily through American Sign Language ("ASL"). See Frilando v. Metropolitan Transit Auth., 21-0169 (2d. Cir. 2022). The plaintiff, Kenneth Frilando, ("Plaintiff" or "Frilando") had applied for three jobs with defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Authority (collectively, "Defendants"): 1) train operator, 2) track worker, and 3) bus operator. Frilando requested, among other things, ASL interpretation of the pre-employment exams that were mandated as part of the job applications for each of the three jobs, which the Defendants refused to provide. Instead, Defendants only "offered to provide ASL interpretation for the exam instructions." Frilando, at p. 2.

Frilando sued Defendants alleging violations of the Americans with Disabilities Act of 1990 ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), the New York State Human Rights Law ("SHRL"), and the New York City Human Rights Law ("CHRL"). The United Stated District Court for the Southern District of New York ("SDNY" or "District Court") ruled on cross-motions for summary judgment allowing only Plaintiff's claim for Defendants' failure to accommodate to survive. See Frilando v. N.Y.C. Transit Auth., 463 F.Supp.3d 501 (S.D.N.Y. 2020). The case was then reassigned, and after a four-day bench trial, the SDNY issued granted judgment in favor of Defendants. Frilando v. N.Y.C. Transit Auth., 513 F.Supp.3d 356 (S.D.N.Y. 2021). The Court determined that each of the statutes at issue require that employees, as well as job applicants, be "otherwise qualified" in order to win a failure-to-accommodate claim, which Plaintiff failed to do. Frilando then appealed, arguing that the SDNY erred in concluding that he was not "otherwise qualified" for the train operator, track worker, and bus operator positions.

The Second Circuit, in upholding the District Court's decision regarding the failure to accommodate claim, determined that the ability to communicate in English, not ASL, and hear sounds "were essential functions of the three positions," noting that Frilando "concedes [that] he cannot understand or be understood in spoken English, and . . . [the] trial testimony established that [he] cannot satisfy the minimum hearing standard for any position.'" Frilando, at p. 3. The Second Circuit distinguished Frilando's case from others where track workers were not required to speak in English or hear sounds in order to perform the essential functions of their jobs. Although Frilando argued that the District Court should have considered whether he was "otherwise qualified" to take the pre-employment test and not whether he was "otherwise qualified" for the three positions, the Second Circuit rejected this argument, relying on Williams v. MTA Bus Co., No. 20-2985, 2022 WL 3330099 (2d Cir. 2022), which raised a similar claim and argument. The Second Circuit decided that "[j]ust as in Williams, here too, Frilando 'was not an . . . employee [of Defendants] – and thus did not hold an 'employment position' – in his capacity as 'test-taker.'" Frilando, at p. 4. The Second Circuit also stated that "[t]o successfully raise a failure-to-accommodate claim under these circumstances, therefore, Frilando needs to be 'otherwise qualified' to serve as a train operator, track worker, or bus operator, and not merely as a test-taker." Finding no error in the District Court's conclusion, the Second Circuit affirmed the SDNY Order and Judgment.

SECOND CIRCUIT THROWS COMPLAINT UNDER THE BUS: SCHOOL BUS DRIVER'S CRITICISM ABOUT REPORTING PROTOCOLS HELD TO BE UNPROTECTED SPEECH

Recently, the United States Court of Appeals for the Second Circuit ("Second Circuit" or "Court") denied an appeal by a school bus driver and Union Vice President James Shara ("Plaintiff" or "Shara"), who appealed the dismissal of his complaint by the United State District Court for the Northern District of New York ("NDNY" or "Northern District") which alleged that the Maine-Endwell Central School District ("Employer" or "School District") violated his First Amendment rights by terminating him for speech made in his capacity as a union leader. Shara v. Maine-Endwell Cent. Sch. Dist., No. 20-2068 (2d Cir. 2022). The Second Circuit held that Shara did not allege that he spoke as a citizen or that he spoke on a matter of public concern, affirming the dismissal by the Northern District.

In June 2016, Shara was hired as a bus driver by the School District, and in May 2018, was elected Vice President of the bus drivers' union. In October 2018, he spoke with a School District mechanic about safety issues with buses that failed inspection. Shara insisted that safety issues should be reported daily until corrected, while the mechanic stated that issues need only be reported once. The School District's Director of Auxiliary Services agreed with the mechanic. However, Shara continued to raise the issue of reporting protocols for the following weeks. Eventually, the School District's Director of Personnel Relations told Shara he would be disciplined if he continued to insist on his preferred method of reporting. Shara nevertheless persisted, and in January 2019, the School District's Director of Personnel Relations sent Shara a counseling memorandum urging him to comply and warning him he would be subject to further discipline if his behavior continued. Shara was then placed on administrative leave three days later, and after another three days, terminated.

In determining if Shara's speech was protected, the Second Circuit applied its standard for public employee's speech; namely whether the employee "spoke as a citizen rather than solely as an employee" and "whether he spoke on a matter of public concern." Shara, No. 20-2068, p. 7. The first prong requires two inquiries: "(1) whether the speech falls outside of his official responsibilities; and (2) whether there is a civilian analogue to the speech. Id. The Second Circuit held that Plaintiff did not allege his conversations concerned policy decisions that affected the School District or the local community. While Plaintiff argued he spoke in his union capacity, the Second Circuit held "his position as an officer of the union does not transform his employment-related conversations into speech as a citizen." Shara, p. 16. Furthermore, Plaintiff's speech concerned a workplace disagreement on reporting protocols and was in regard to his ability to execute his job duties. Furthermore, there was "no civilian analogue" to the speech, as the discussions only occurred with School District officials at the workplace and in union negotiations. Shara, p. 16-17.

As to the second prong, the Second Circuit looked at Plaintiff's motive, as well as the forum and manner in which the speech occurred. Shara, p. 12. The Court found that Plaintiff pled "little more than an intramural dispute among school employees about the best way to report maintenance issues involving the School District's buses." Shara, p. 18-19. There were no allegations as to the School District permitting unsafe buses on the road or that officials attempted to sweep needed repairs under the rug. Shara, p. 19. The Court also stated that, while unsafe buses may be of interest to the local community, internal communications about protocols are not directed to or would attract the attention of reporters or members of the public. Shara, p. 20.

COVID-19 ACTIONS GET FAILING GRADE: NLRB FINDS COLLEGE'S PANDEMIC-RELATED DECISIONS BREACHED THE DUTY TO BARGAIN

On August 24, 2022, the National Labor Relations Board ("NLRB" or "Board") ruled that Goddard College Corporation ("GCC") violated the statutory rights under the National Labor Relations Act of 1935 ("NLRA" or "Act") of the members of United Auto Workers, Local 2322 ("Union") by unilaterally instituting certain measures related to COVID-19 that had not been bargained to impasse and that constituted material, substantial and significant changes to the terms and conditions of employment. See Goddard College Corp., Case No.: 03-CA-283012 (August 24, 2022).

First, when GCC was contemplating the return of faculty, staff, and students back to campus in the summer of 2021, it contacted the Union to initiate negotiations concerning this process for Union members. The main issues that had plagued these negotiations were: i) the actual return-to-work date for Union members and ii) whether to require or recommend masks while on campus. According to the Board, rather than bargaining to fruition or impasse on these issues, GCC unilaterally implemented its last, best, and final offer without proper notice to the Union and/or its members, which constituted a violation of § 8(a)(5) of the NLRA that requires "an

employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes to mandatory bargaining subject matters." See NLRB v. Katz, 369 U.S. 736 (1962). Specifically, GCC: i) set the return-to-work date on September 27, 2021, even though the Union had proposed October 18, 2021 and ii) made masks a recommendation instead, as posited by the Union, that it be a requirement to be on campus. The factual record demonstrated that GCC and Union met on at least six occasions where these subjects were addressed, and at the conclusion of each of these meetings, there was a reasonable expectation that further discussions would occur. However, on September 15, 2021,GCC instituted its last, best, and final offer in contravention of the Act.

Second, in the midst of the pandemic, GCC, which is a small liberal arts college located in Vermont, hired an individual to serve in the role of Assistant Development Director in September 2020. He, at all times relevant to this matter, was a full-time resident of Florida, and as part of his employment, he was permitted to work remotely. However, in conjunction with the return-to-work agenda referenced above, GCC decided that the Assistant Development Director's position required an on-campus presence, thereby unilaterally changing this individual's job duties and qualifications. The Board determined that altering the terms and conditions of this individual's employment without first giving notice to the Union also violated § 8(a)(5) of the Act because "the circumstances by which the Respondent modified the work location of [] . . . a unit employee constituted a material change without providing the Union with timely notice and a meaningful opportunity to bargain," thereby rejecting GCC's argument that it had the "right to establish job duties and responsibilities for its employees." Goddard College Corp., p. 12.

THE AIRING OF DIRTY LAUNDRY: NLRB SEEKS TO REVERSE AFFECTS OF FORMER MEMBER'S FAILURE TO DISCLOSE FINANCIAL ENTANGLEMENTS

On August 19, 2022, the National Labor Relations Board ("NLRB" or "Board") issued a decision in ExxonMobil Research & Engineering Co., Inc., 371 NLRB 128 (2022) that had been previously decided by the Board, when former NLRB-member William Emmanuel ("Emmanuel") presided over this initial determination. The earlier decision found that ExxonMobil Research & Engineering Co., Inc. ("Exxon" or "Employer") did not violate the National Labor Relations Act of 1935 ("NLRA" or "Act") when the Employer unilaterally altered the terms of the collective bargaining agreement by and between Exxon and a bargaining unit representing lab researchers. See ExxonMobil Research & Engineering Co., Inc., 370 NLRB 23 (2020).

The Democratically-controlled Board determined that Emmanuel, a Republican-appointee, should not have participated in that initial decision, which overturned a decision issued by an NLRB Administrative Law Judge finding violations of the NLRA, because Emmanuel held Exxon stock through an energy-based investment fund. According to the Board, his failure to alert ethics officials of his stock holdings in this publicly traded company constituted a violation of his ethical obligations under federal ethics laws. Therefore, the Board determined that the previous decision involving Exxon should be vacated and set aside.

As such, this Board decision increases further scrutiny on the decisions in which Emmanuel participated. Namely, Emmanuel ruled in favor of various employers in cases before the Board involving Marathon Petroleum Co., CVS Health Corp., and George Washington University Hospital. In all of these three, employer-friendly determinations, Emmanuel sided with the majority in finding that no violations of the Act occurred. Further, in all of these three, employer-friendly determinations, Emmanuel was discovered to have investment interests in these entities either through energy-based or health care-based investment funds. Moreover, in all these three, employer-friendly determinations, the Board on which Emmanuel sat reversed earlier decisions finding in favor of the union and/or employee.

The result of this groundbreaking determination is to be determined, based on the specific rulings in each of these cases. However, it is important to note that the potential reversal of these determinations involving Emmanuel could walk-back the anti-union precedents established by these cases.

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