Employee Benefits
In Focus

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For Clients and Friends
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"SMART" UNION HIT WITH $283,000 AIDING AND ABETTING DECISION

The standard for union liability for breach of its duty of fair representation or for aiding and abetting an employer against members is high, but not insurmountable as a decision from federal court in Philadelphia indicates. The decision also confirms that sense of smell may be as important as legal sense in these cases. *Lett v. Southeastern Pennsylvania Transp. Authority and Int'l Ass'n of Sheet Metal, Air, Rail and Transportation Workers, Local 1594*, Case No. 19-CV-3170 (KSM) (E.D. Penn. Sept. 27, 2022).

Aaron Lett is a 54-year-old man with seven children, three living at home, employed by the Southeastern Pennsylvania Transportation Authority ("SEPTA") as a bus operator since 2015, and represented by the International Association of Sheet Metal, Air, Rail and Transportation Workers, Local 1594 ("Union" or "SMART"). Lett suffered from kidney disease requiring regular dialysis. When Lett's assigned shift conflicted with required dialysis, SEPTA ignored his requests for accommodation; SMART said there was nothing it could do; and Lett resigned. He then sued SEPTA claiming constructive discharge, and the Union for aiding and abetting SEPTA's disability discrimination. SEPTA settled before trial, leaving the Union to face the Court that ruled against it for Lett.

Under the relevant law for aiding and abetting as well as "hybrid" cases involving a member's claims against employer and union, the union is liable only if (1) the employer violated contract or law and (2) the union substantially assisted or encouraged the discrimination. The Court found that SEPTA had discriminated against Lett. "Lett has proven," found the Court, "... that he was constructively discharged in October 2017 when SEPTA forced him to choose between reporting for his shifts on the bus list and attending life-saving dialysis – with the belief that if he chose dialysis, he would accumulate attendance points and ultimately be fired in any event."

Next, the Court found Union liability reasonable under the facts and law. While "inaction in the face of known discrimination will rarely amount to substantial encouragement or assistance" supporting aiding and abetting liability, noted the Court, "the Union did not merely decline to act on the knowledge that SEPTA was refusing to accommodate Lett, but actively inserted itself into the situation to Lett's detriment." Union officials "did not attempt to contact Lett when his picks were no longer available and instead placed Lett on the bus list, selecting a run that was completely incompatible with Lett's dialysis treatments." Such activity sufficed to sustain the claim against the Union, ruled the Court.

As likely as law, the Court may have been moved by the testimony of Lett's wife Denean. Following Lett's testimony as to the "big burden on me" as "the breadwinner" for a "young family," Deann Lett recounted: "Coming from a wife ... to see him totally diminished, he felt like every door he went to was completely closed. Every time he tried to approach, they shut him down." Then, "I remember times he would come home so low. It took so much time from me just to lift him up ... [he] was totally depressed. I never seen my husband like that ever in my life. From the 14 years up until now, I never seen this."

The Court awarded $183,604.97 in backpay and $100,000 in compensatory damages against the Union.

NLRB ISSUES NEW GUIDANCE ON 10(j) INJUNCTIONS

In a sign of the continually evolving approach of the Biden National Labor Relations Board ("NLRB"), General Counsel ("GC") Jennifer Abruzzo stated over a year ago that 10(j) injunctions in NLRB charges were "one of the most important tools available to effectively enforce the [National Labor Relations] Act." Now, in furtherance of that position, the GC has issued another memorandum on the topic of 10(j) injunctions directing that "[r]egions should routinely attempt to obtain full interim relief by the charged party's written agreement to resolve the 10(j) portion of the case," assuming that the parties are unable to settle the case as a whole. If that fails, the Region would then pursue a 10(j) injunction in federal court. If the Region determined that such negotiations were futile, it has the discretion to proceed directly to court.

Section 10(j) of the National Labor Relation s Act ("Act") gives the NLRB the tool of the injunction to stop ongoing unfair labor practices ("ULPs") while litigation is proceeding on the legality of the activities. The NLRB, in this most recent memorandum, lists fifteen categories of labor disputes where 10(j) injunctions may be used, including bargaining, interference with organizing campaigns, and a successor's refusal to recognize and bargain. The labor community should pay attention to the GC's and Regions' growing interest in 10(j) interim relief.

FIRST THE UNIONS, NOW THE SHAREHOLDERS: MAJOR COMPANIES FACE BLOWBACK FROM SHAREHOLDERS OVER THEIR HANDLING OF LABOR DISPUTES

Starbucks and Apple are the latest large companies to face criticism from investors over their handling of labor disputes. In September, both companies received shareholder proposals which called for respect for labor rights, audits of the treatment of workers, and a curb on union busting. Each proposal ultimately failed in shareholder votes, but not before receiving over one-third support.

As is often the case, much of the shareholder activism came from large institutional investors, particularly public pension funds. For instance, the New York City Comptroller on behalf of the New York City Retirement Systems made each of the referenced proposals and intends on continuing to advocate for environmental, social justice and governance concerns through the power of the funds' investments. Indeed, the funds argue that the companies' long-term value could be harmed by union interference allegations.

"The troubling reports of anti-union behavior and interference with organizing efforts by both Apple and Starbucks stand in sharp contrast with how these companies present themselves to customers," New York City Comptroller Brad Lander said. "Shareholders, including the New York City pension funds, are concerned that this misalignment with their brand and stated commitments to worker freedom of association poses reputational, legal, and operational risks that the companies cannot afford."

Specifically, the Apple and Starbucks proposals called for independent audits of workers' freedom of association and collective bargaining rights. "There should be no doubt that where partners choose to be represented by a union, we fully respect that choice," Starbucks said on its website. Apple said in an earlier statement: "We regularly communicate with our teams and always want to ensure everyone's experience at Apple is the best it can be."

This is only the most recent attempt at socially conscious governance at Amazon. This past May, shareholders at Amazon secured 47% of independent voters—those who can vote but do not have controlling shares—and 38.9% in total voters in support of improvements in labor protections at the company, including supporting more reporting from the company on workers' rights to freedom of association and collective bargaining.

In response, Amazon said that it had already disclosed the information touting its human rights commitment and approach. "Our employees' voices are critical to us, so we also go beyond mere compliance with legal requirements by listening and responding to ideas and concerns of our employees, empowering them to communicate and provide feedback through various formal and informal mechanisms," the company told investors.

Beyond the tech companies, electric auto maker Tesla has faced a proposal to respect employee rights to unionize that received 33.4% of shareholder votes in August. Last year, the National Labor Relations Board ("NLRB") concluded that Tesla has repeatedly violated U.S. labor laws regarding the right to organize. In response, Tesla's board told investors that the proposal would not create additional benefits to its employees or value for its shareholders because it has already included adequate disclosure over employee rights and is "actively engaged in protecting these rights." Tesla said the proposal was asking it "to expend resources to create and maintain a policy framework and additional administrative bureaucracy which will not meaningfully alter" its human rights commitment. The company also pointed out that its wages meet or exceed those at comparable manufacturing jobs where it operates, and that it recently increased its base pay even further.

EEOC GETS DIGITALLY SERIOUS ABOUT WORKPLACE DISCRIMINATION AND HARASSMENT

On October 19, 2022, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a press release concerning its updated "Know Your [Employee] Rights" poster and brought it into the digital age. The poster more easily addresses equal pay, genetic information and retaliation, includes a specific indication that harassment is prohibited, and also clarifies that sex discrimination encompasses discrimination that is based on pregnancy, sexual orientation and sexual identity.

By way of background, several federal anti-discrimination laws that the EEOC enforces require covered employers to conspicuously display to employees and applicants a notice describing the federal laws prohibiting job discrimination and harassment. The EEOC's revamped poster, now dubbed "Know Your Rights: Workplace Discrimination is Illegal," summarizes these laws and explains that employees or applicants can file a charge with the EEOC if they believe that they have experienced discrimination.

Most notably, the poster contains a quick response ("QR") barcode that, when scanned with a compatible digital device such as a mobile phone's camera, automatically transports users to the EEOC's webpage detailing the process and procedure for filing an employment discrimination charge. According to the press release, EEOC Chairwoman Charlotte A. Burrows praised the new poster as a "win-win for employers and workers alike" because, by "using plain language and bullet points," employers can more easily "understand their legal rights" and responsibilities, and employees can more easily understand "their legal rights and how to contact [the] EEOC for assistance." Additionally, the press release encourages employers to supplement their physical posting with one *electronically* posted in an easily accessible location, such as the employer's website.

Employers who fail to post the legally required notice in "a conspicuous location in the workplace where notices to applicants and employees are customarily posted" are subject to monetary fines (currently a maximum of $612 per violation) as well as the potential of receiving an adverse inference to an employer's defense to an EEOC claim. Currently, however, the EEOC did not announce a deadline for the replacement of the now-outdated signage.

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.

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