Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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PETTY SLIGHTS AND TRIVIAL INCONVENIENCES: AGE DISCRIMINATION CLAIM BY NYPD LIEUTENANT TOSSED BY FIRST DEPARTMENT

Recently, the Appellate Division for the First Department ("Appellate Court") issued a decision in *Lett v. City of New York*, Case No. 2021-4616 (1st Dept. October 13, 2022), which affirmed a lower court's dismissal of an age discrimination claim brought by a lieutenant in the New York City Police Department ("NYPD" or "Department"). The Appellate Court determined that the factual allegations raised by the plaintiff in that case constituted "petty slights and trivial inconveniences" that did not rise to the level of discrimination either under the New York State Human Rights Law (Executive Law) § 296 ("SHRL") or even the New York City Human Rights Law (Administrative Code of New York City) § 8-107 ("CHRL").

By way of background, the plaintiff was a lieutenant in the Criminal Intelligence Section of the NYPD when he was arrested on a domestic violence charge stemming from a dispute involving his ex-wife. Immediately thereafter, the NYPD suspended the plaintiff for 30 days, as is standard operating procedure for the Department. Within one week after this arrest, the criminal charge against the plaintiff was dismissed and his suspension was truncated to 20 days. However, upon his return to work, the plaintiff alleged that the Department, and more specifically his direct supervisor, treated him as guilty of the domestic violence charge. Further, his superior officer said that the plaintiff, who had sufficient time to receive a typical 20-year service retirement, should "swallow the bitter pill [associated with the criminal charge] and file for retirement. *Lett v. City of New York*, Index No. 150403/2020, p. 2 (Ramseur, J. May 27, 2021). The plaintiff further alleged that the Department opened up a number of internal investigations into his job performance, placed him temporarily on modified duty, transferred him to undesirable posts, and "treated him less well than other employees because of a protected characteristic such as age." *Id.*, p. 5.

In adopting the rationale from the Justice Dakota D. Ramseur of the Supreme Court, New York County, the Appellate Court ascertained that: "Nothing in the complaint indicated that his suspension and placement on modified duty were for any reason other than disciplinary actions taken after his arrest for domestic violence.: *Lett*, Case No. 2021-4616, p. 1. Further, the Appellate Court held that the other alleged adverse employment actions "did not rise to the level of actionable adverse employment actions because "alleged stray remarks, . . ., did not, without more, rise to an inference of ageist bias." *Id.*, p. 2.

NLRB PROPOSES RETURNING TO PRE-TRUMP BLOCKING CHARGE AND VOLUNTARY RECOGNITION POLICIES

On November 4, 2022, the National Labor Relations Board ("NLRB" or "Board") issued a Notice of Proposed Rulemaking ("Proposed Rule"), which would rescind and replace a rule published in or around April 2020 ("2020 Rule") and reinstate the Board's prior law governing the National Labor Relations Act ("Act"), including the traditional "blocking charge" policy, the Board's "voluntary recognition bar," and the Board's approach to voluntary recognition in the construction industry. *See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 87 Fed. Reg. 66890 (proposed November 4, 2022) (to be codified at 29 C.F.R. pt. 103).

The 2020 Rule issued by a Republican controlled NLRB allowed: (1) representation elections to proceed despite unadjudicated unfair labor practice charges alleging coercive conduct; (2) challenges to a union's representation status after it had been voluntarily recognized by an employer and showed a majority of employee support before there had been a reasonable period for collective bargaining; and (3) challenges to a union's representative status in the construction industry despite undisputed evidence of the union's majority supported in detailed contract language.

The Proposed Rule will rescind the 2020 Rule and revert to the following policies and procedures. First, the reinstated blocking charge policy would allow Regional Directors to delay an election when an unfair labor practice charge is filed, if the alleged conduct interferes with employee free choice or is inherently inconsistent with the election petition itself. The charge must be supported by an offer of proof listing the names of witnesses who will testify in support of the charge and a summary anticipated testimony from each witness. The historic blocking charge policy, according to the Board, better protects employee free choice than the 2020 Rule.

Second, the Proposed Rule codifies *Lamons Gasket, Co*., 357 NLRB 739 (2011), which established that an employer's voluntary recognition of a union bars the filing of an election petition until a reasonable period of time for collective bargaining has passed. The Board defines "a reasonable period of bargaining" to be no less than 6 months after the first bargaining session and no more than 1 year. 357 NLRB at 748. By contrast, the 2020 rule permitted a 45-day challenge period where an employer gave notice of voluntarily recognizing a union.

Third, the Proposed Rule reinstitutes a prior approach to voluntary recognition in the construction industry. The Proposed Rule restores a six-month limitations period for election petition challenging a construction employer's voluntary recognition of a union. It will also reinstate the rule that sufficiently detailed language in collective

bargaining agreements can serve as sufficient evidence that voluntary recognition is based on Section 9(a) of the Act.

Members Kaplan and Ring dissented to the Proposed Rule. Comments must be received by the Board on or before January 3, 2023 and reply comments are due on or before January 17, 2023.

NINTH CIRCUIT COURT OF APPEALS FINDS THAT WORKERS SHOULD BE COMPENSATED FOR TIME SPENT BOOTING UP COMPUTERS

On October 24, 2022, a unanimous three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed (link) a decision from the U.S. District Court for the District of Nevada granting Customer Connexx LLC ("Connexx") summary judgment on their workers' overtime suit. *Cadena v. Customer Conexx LLC*, No. 21-16522 (9th Cir. 2022). In finding that the time spent by Connexx call center service agents turning their computers on could be compensable "work" within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., as amended by the Portal-to-Portal Act, 29 U.S.C. §§ 251–62, the Court joined sister circuits who have reached a similar conclusion. The Ninth Circuit remanded this case back to the District Court for consideration whether time spent booting up and down was compensable or was not compensable under the *de minimis* doctrine, and whether Connexx had no knowledge of the alleged overtime such that it was not in violation of the FLSA's overtime requirements.

The FLSA requires that employees be paid for all hours worked, except for those activities that are preliminary and postliminary to the employee's primary activity. The focus should be on the importance of the pre- or post-work task compared to the employee's primary duty, and whether such activity is "integral and indispensable" to the employee's primary duties. The standard for such determination is whether the putative task is "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 36 (2014). Thus, while time spent waiting to perform the first principal activity of a shift is ordinarily not compensable, the preparation of equipment necessary to perform principal activities is compensable.

In *Connexx*, the employees' primary duties consisted of answering customer phone calls and scheduling appliance pickups. Employees were not paid for time spent booting up computers, which once accomplished, employees clock in and out using a computer-based timekeeping program, which they must do before accessing other job-relevant programs. The District Court granted summary judgment for Connexx finding that time spent booting up and digitally clocking in were not principal activities because the agents were not hired for that purpose, but rather to speak with customers and perform scheduling tasks.

The Ninth Circuit, however, found that the service agents could not perform their jobs without functioning computers and that the District Court should have focused on whether starting the computer led the call center workers to be able to perform their work. For example, the computer programs used by the workers included the phone program called Five9, which makes the calls rather than a physical phone, customer information, scripts, and email programs used to perform these duties. Thus, it held that time spent turning on and booting up their computers is integral to the principal activities performed by the employees and thus may be compensable. Regarding booting down time, the Ninth Circuit clarified in a footnote that its opinion focused on the pre-shift activities, saying that booting down would not be an integral part of the workers' jobs. The Tenth Circuit recently reached a similar holding in another case involving customer call center employees. *See Peterson v. Nelnet Diversified Solutions, LLC*, 15 F.4th 1033 (10th Cir. 2021). While the Second Circuit has yet to opine on the issue, employers wishing to avoid wage and hour liability exposure should proceed carefully with advice of counsel.

HAPPY VETERANS DAY, ESPECIALLY TO ALL THOSE WHO SERVED OUR COUNTRY

We would like to extend our appreciation for all those who served in our armed forces to guarantee our freedom. "Our debt to the heroic men and valiant women in the service of our country can never be repaid. They have earned our undying gratitude." President Harry Truman.

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