Labor & Employment Issues
In Focus
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For Clients and Friends
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CUNY'S INTERNAL SEXUAL HARASSMENT INVESTIGATION GIVES RISE TO 'STIGMA PLUS" DUE PROCESS CLAIM

The Eastern District of New York refused to grant summary judgment to the City University of New York ("CUNY") on a claim that a substitute athletic manager, who was fired for sexual harassment, was denied liberty without due process. *Knights v. City Univ. of N.Y.*, E.D.N.Y., No. 19-cv-00480. In a ruling issued November 8, Judge Frederic Block said a jury could reasonably conclude that CUNY's Title IX report contained false statements and that the report was disseminated widely enough to prevent the accused from finding another job. Judge Block said a jury could also reasonably find that CUNY acted pursuant to an "official policy" when it terminated the accused—a requirement in a § 1983 due process claim against a municipality.

Rogelio Knights Jr. was hired in September 2016 as Bronx Community College's ("BCC") temporary athletic manager set to serve through March 2017. About four months into his tenure, CUNY informed Knights that he was the subject of a Title IX sexual harassment investigation and that he was being put on paid leave. When the investigation ran past March, CUNY extended Knights' employment to April 2017 to accommodate it. Knights was then officially terminated less than three weeks before his extended employment term was up. Knights grieved his termination in arbitration, claiming he was fired without the due process guaranteed to him by his collective bargaining agreement. CUNY then rescinded the termination and paid him for the days remaining on his extended employment term; the arbitrator dismissed Knights' termination grievance as moot.

Knights then sued CUNY along with two individuals: Christopher Todd Carozza, who conducted the Title IX investigation, and BCC President Thomas Isekenegbe. He sued all three parties for deprivation of liberty and additionally sued CUNY for deprivation of property without due process. The court granted summary judgment on all the claims except the deprivation of liberty claim against CUNY.

In order to prevail on his deprivation of liberty claim against CUNY, Knights will need to prove that he was entitled to a "name-clearing hearing." Entitlement to such a hearing will require Knights to prove what is called a "stigma plus" claim, which can arise in the context of "alleged government defamation [which] occurs in the course of dismissal from government employment." *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004) (quoting *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73 (1972)). A stigma plus claim will be successful where it shows (1) a derogatory statement capable of being proved false and (2) that the statement created a material burden or alteration of the plaintiff's rights by being "disseminated widely enough to damage the discharged

employee's standing in the community and foreclose future job opportunities." *Brandt v. Board of Education*, 820 F.2d 41, 45 (2d Cir. 1987.

Here, Knights claims that statements in his Title IX report, as well as statements made a by a CUNY basketball coach to the media, were false, and that these statements prevented him from finding another teaching job in New York City. Judge Block held that these allegations could make out a stigma plus claim. However, because CUNY is a municipal entity, it will only be held liable if it is found to have acted pursuant to official policy. Granting final authority to a municipal official who exercises discretion in his decision-making can constitute an official policy under what is known as *Monell* liability. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Because President Isekenegbe exercised final authority when he terminated Knights, a jury could reasonably find that this termination was an exercise of official CUNY policy which denied Knights due process. As such, Knights' claim that CUNY deprived him of liberty lives to see another day.

PBGC EXTENDS COMMENT PERIOD FOR PROPOSED RULE ON CALCULATING WITHDRAWAL LIABILITY

On November 9, 2022, the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency responsible for the health of the nation's multiemployer pension plans, extended the time from November 14 to December 13, 2022 to receive public comments on its proposed rule that would allow more choice to actuaries in selecting the present value interest rate for calculating withdrawal liability.

The PBGC initially released its Proposed Rule with a public comment period of thirty (30) days to November 14, 2022. The Proposed Rule, when effective, would expressly permit plan actuaries to calculate the present value of a plan's unfunded vested liabilities using the PBGC "annuity" rate or a blend of that rate and the funding method/ equity market rate of return method currently approved by the Sixth, District of Columbia and Ninth Circuit Courts of Appeals. Currently, the annuity rate or blend yields significantly higher withdrawal liability than the funding method, but has been rejected by the Appeals Courts. In affirming the annuity and blend method, the Proposed Rule does not reject the funding method but suggests it might require modification, a topic likely to draw public comment as well. Given the multi-million dollar stakes, comments and a final rule will likely be scrutinized, perhaps challenged in another round of litigation.

GRIEVANCES BELONG TO THE UNION

A fundamental issue unions must confront when addressing members' grievances is to whom the grievance "belongs." Over the decades, courts have been clear that the grievance process is controlled by the union. To the extent a member is dissatisfied with the union's representation, the member has other recourse, but not the grievance process. Thus, if, for whatever reason, so long as it is not an unlawful one, the union chooses to not pursue a member's grievance, this should be lawful. Recently, this issue was analyzed by United District States District Judge Jane Magnus-Stinson of the Southern District of Indiana when the Court was asked to decide whether a union, Machinists Kentucky Lodge No. 681 ("Union"), was required to arbitrate a claim of a member who was fired due to his Nazi activities. In a decision issued on November 9, 2022, the Court ruled that the Union does not have to pursue Dylan Anderson's termination, not because representing a Nazi would "invite workplace strife," but rather because neither the Union nor the employer wanted to arbitrate. The case is *Kentucky Lodge No. 681 v. Anderson et al.,* case number 4:21-cv-00066, in the U.S. District Court for the Southern District of Indiana.

Cook Compression fired Anderson from his job at its unionized Jeffersonville, Indiana, facility in August 2020 after it received complaints from workers and the public about Anderson passing out Nazi literature at a state forest. Anderson filed a grievance, which the Union processed through the first few steps of its contractual dispute resolution process with Cook. The Union demanded arbitration, and Cook refused. The Union later decided against compelling arbitration but, concerned about its legal duty to represent Anderson, filed the suit seeking the Court's opinion of its obligation rather than withdrawing its demand. The Union asked the Court to find that the dispute is not arbitrable because neither the Union nor the company wanted to arbitrate, and Anderson lacked standing to compel them to do so. The Union also argued that the dispute is not arbitrable because interpreting the CBA to require arbitration "would run afoul of long-settled federal labor policy" to minimize workplace strife by possibly returning a Nazi to work.

Thus, the Court granted the Union's motion for summary judgment based on a Union's flexibility in deciding whether to pursue a grievance to arbitration, but declined the Union's request for a declaratory judgment that the grievance was not arbitrable because fighting for Anderson's job was "indecent." "Because the only parties to the [collective bargaining agreement] do not want to arbitrate Mr. Anderson's termination, there is no basis for this court to order them to do so," Judge Magnus-Stinson said. The Court rejected the Union 's policy argument as the Union "has not cited a single authority" allowing her to disregard the CBA "so long as the court agrees that a particular employee's termination was based on conduct and a belief-system that is sufficiently odious to society in general and a workplace in particular," the judge said. The judge did not decide Anderson's cross-claim, which seeks a declaration that his off-duty political

activity did not justify his firing and an order that Cook arbitrate his grievance. However, the judge directed the parties to attempt to resolve all remaining issues without a trial.

Finally, the Court emphasized that it was not passing judgment on the merits of Anderson's firing, nor whether the Union breached its duty to represent him, neither of which is at issue in the suit. While the Court avoided addressing fair representation issues, this case underscores the care a union must take in considering grievances before refusing to pursue them, in even the most outrageous cases.

NEW REGIONAL DIRECTOR FOR BROOKLYN NLRB REGION 29

On October 31, 2022, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo announced the appointment of longtime NLRB staffer Teresa Poor as the new Regional Director for Region 29, covering Brooklyn, Queens, Staten Island, and Long Island.

A Washington state native, Poor has spent nearly a quarter century with the NLRB working in Region 2 (Manhattan) as well as Region 29, working her way up from Examiner to Compliance Office, Supervisory Examiner and Assistant to the Regional Director. Prior to her career with the Agency, Ms. Poor worked with unions including the United Farm Workers and the American Federation of Musicians as an organizer, as well as a researcher at the Center to Protect Workers Rights.

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