Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
December 1, 2022 Edition

COURT GRANTS AND BLOCKS DELIVERY OF 10(J) RELIEF AGAINST AMAZON IN UNION ORGANIZING CAMPAIGN

The General Counsel and her Regional Directors of the National Labor Relations Board ("NLRB" or "Board") have ramped up petitions for interim remedial relief under Section 10(j) of the National Labor Relations Act ("NLRA" or the "Act"), seeking to remove employer incentives for delay that perpetuate the employer's unfair labor practices during union organizing efforts while the case meanders through Board legal proceedings. A recent high profile decision from the United States District Court for the Eastern District of New York involving America's major retailer and an upstart union illustrates that courts will sometimes join but not rubber stamp this effort. *Drew-King v. Amazon.com Servs. LLC*, No. 22-CV-01479 (DG) (E.D.N.Y. Nov. 18, 2022).

In a Cinderella story for organized labor, a grassroots group of low-skilled workers at Amazon.com formed the Amazon Labor Union ("ALU") and won a landmark election at a JFK Airport warehouse without support of any major union. In April 2020, a year prior to the organizing effort, Amazon discharged Gerald Bryson for an altercation with a co-worker over his criticism of Amazon's COVID-19 policies, while the co-worker was only reprimanded. In June 2020, Bryson filed unfair labor practice charges against Amazon alleging disparate treatment to suppress employee rights. NLRB Region 22 issued a complaint and an Administrative Law Judge ("ALJ") found that Amazon had violated Section 8(a)(1) of the Act by disciplining Bryson because of his worker advocacy.

In the meantime, on July 8, 2022, then Region 22 Regional Director Drew-King, following the policies of General Counsel Jennifer Abruzzo, applied to federal court for a Section 10(j) injunction reinstating Bryson and ordering Amazon to cease and desist from unlawful anti-union efforts. But Cinderella is a fairy-tale, District Judge Diane Gujariti reminded the labor movement, granting and denying the petition in respective parts.

District Judge Gujariti first reviewed the legislative and judicial background for Section 10(j) interim relief, characterizing the injunction as "an extraordinary remedy." For the Court to issue a 10(j) injunction, the Court stated that it must first "find reasonable cause to believe that an unfair labor practice has been committed," and then that "injunctive relief is just and proper." Injunctive relief is "just and proper" when "necessary to prevent irreparable harm or to preserve the status quo," noted the Court.

Applying the above, District Judge Gujarati had no difficulty granting Regional Director Drew-King's petition for a cease and desist order, posting, and a public reading of the order prohibiting future unfair labor practices, discharges, and other interference

with employee rights, including Amazon employees' rights to organize. District Judge Gujarati explained that Courts must give deference to the Regional Director's factual and legal conclusions, bolstered here by the ALJ's finding after hearing that Amazon had indeed violated the Act. Accordingly, in a much heralded win for the Board, the District Court granted the NLRB's petition for a 10(j) injunction as to this part.

However, the Court balked at reinstating Bryson, finding that such interim relief was not necessary to prevent irreparable harm nor to preserve the status quo, and therefore was not "just and proper." Bryson had been discharged long prior to the ALU effort, was not a leader or well known to the Amazon employees being organized, and the ALU drive had gathered strength notwithstanding Bryson's absence, reasoned the Court. Consequently, according to the Court, these facts, developed during discovery in the 10(j) litigation, distinguish this case, on its specific facts and circumstances, from those cases granting 10(j) relief where "union activists were terminated contemporaneous with their union activity and a diminution of union support was shown to exist ..." Since "the weight of record evidence does not suggest that Bryson's reinstatement will have anything more than a nominal, if any, effect on Amazon employees," ruled Judge Gujarati, "the Court declines to order interim Bryon-specific affirmative relief," rejecting the Board's petition as to that part.

THE EMPIRE STATE TAKES AIM AT RETALIATORY ABSENCE POLICIES

On November 21, 2022, Governor Kathy Hochul signed a bill that prohibits private sector employers from disciplining employees for taking time away from the job for legally recognized absences. Specifically, the legislation (S.1958A / A.8092B) amends New York State Labor Law ("Labor Law") § 215 and proscribes that an employer shall not "discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee . . . because such employee has used any legally protected absence pursuant to federal, local, or state law." Further, this amendment to § 215 of the Labor Law expressly states that the terms "threaten, penalize, or in any other manner discriminate or retaliate against any employee includes . . . assessing any demerit, occurrence, any other point, or deduction from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay." This Labor Law amendment may spell danger for popular employer Paid Time Off ("PTO") policies that allow discipline after PTO time is exhausted.

According to the Justification section of the legislation, this new law was passed in order to ensure that employees are not penalized for utilizing accrued sick leave or paid time off to address certain needs. The law is designed to ensure that employees are permitted to take legally-protected time off from their jobs to address certain medical, caregiving, and religious needs without fear of some job-related ramifications, such as pregnant women needing time off for prenatal care, caregivers to stay at home with a sick child or elderly parent, or to accommodate treatment for chronic medical conditions. In

the eyes of the State, employers' absence control policies "violate workers' rights in New York State and discourage them from taking job-protected leave or time off to which they are entitled by law." These "no-fault" policies have the potential of exposing employees who legally invoke their statutory rights to excused absences from work, such as under the Family Medical Leave Act, to discipline, which can include but not be limited to loss of pay, loss of promotional opportunities, demotion, and termination.

Further, this new law is designed to ensure that employers accurately enforce federal, state, and local laws providing for such time away from the job. It is also designed to inform workers about their legal rights to take time off without punishment for certain illnesses, health conditions or disabilities, or the need to care for an ill loved one. As additionally stated in the Justification section of the legislation: "It is the intent of the New York State Legislature to make it explicitly clear that workers shall not be punished or subjected to discipline for lawful absences." This new law goes into effect 90 days from Governor Hochul's November 21st signature.

CONNECTICUT'S CAPTIVE AUDIENCE LAW CHALLENGED IN LAWSUIT

In a case with potential national significance for labor organizing, on November 1, 2022, several prominent plaintiff employer groups filed a lawsuit challenging the Connecticut Department of Labor's ban on "captive audience" meetings, which are mandatory meetings conducted by employers to express their views opposing unionization. Plaintiffs seek a judgement: "(1) declaring that provisions recently added to Connecticut General Statutes Section 31-51q are unconstitutional and preempted, and (2) enjoining Defendants' enforcement of these new provisions against Plaintiffs and their members."

The plaintiffs in the case, *Chamber of Commerce et al v. Dante Bartolomeo et al,* No. 3:22-cv-1373 (D. Ct. 2022), include: 1) the Chamber of Commerce of the United States of America ("U.S. Chamber"), 2) Associated Builders and Contractors ("ABC"), 3) Associated Builders and Contractors of Connecticut ("CTABC"), 4) Coalition for a Democratic Workplace ("CDW'), 5) Connecticut Business & Industry Association ("CBIA"), 6) Connecticut Retail Merchants Association ("CRMA"), 7) National Association of Home Builders ("NAHB"), 8) National Federation of Independent Business ("NFIB") and 9) National Retail Federation ("NRF"). The defendants include Connecticut's Commissioner of the Department of Labor, the Attorney General of Connecticut, and the Connecticut Department of Labor.

At issue are recently enacted amendments, specifically subsections (a) and (b)(2), to Section 31-51q ("2022 Amendments") by the Connecticut General Assembly. Plaintiffs allege that as a result of the 2022 Amendments, employers in Connecticut "are now subject to liability, penalties, and other administrative action when they exercise their federal constitutional and statutory rights to talk to employees about political issues, including 'the decision to join or support any . . . labor organization.'" Plaintiffs allege that the 2022 Amendments violate the First and Fourteenth Amendments to the United States Constitution "by discriminating against employers' viewpoints on

political matters, by regulating the content of employers' communications with their employees, and by chilling and prohibiting employer speech." Plaintiffs further allege that the 2022 Amendments violate the National Labor Relations Act ("Act" or "NLRA") and that the 2022 Amendments intrude into an area "preempted and exclusively regulated by the NLRA." According to the complaint, Plaintiffs "seek prospective injunctive relief enjoining Defendants' enforcement of the 2022 Amendments against employers who discharge or discipline employees for refusing to attend employer-sponsored meetings, or refusing to listen to employer speech or view employer communications, in which the employers intend to communicate their opinions on political matters, including union involvement."

According to the court docket, the District Court granted defendants' motion for an extension of time to answer the Complaint, ordering that defendants respond on or before December 27, 2022.

NLRB EXTENDS TIME FOR SUBMISSION OF COMMENTS RELATED TO NEW, PROPOSED RULES ON REPRESENTATION

On November 29, 2022, the National Labor Relations Board ("NLRB" or "Board") announced that it was extending the time for the public to make initial comments to the recently circulated Fair Choice and Employee Voice Rule ("Proposed Rule"). First issued on November 3, 2022, the Proposed Rule would rescind a final rule that was adopted by the Board on April 1, 2020, under the previous administration's Republican-dominated majority, and reinstate the long used "blocking charges" and voluntary recognition policies favored by unions.

The existing rule provides for : 1) representation election can proceed despite the existence of pending unfair labor practice charges alleging coercive conduct that could interfere with employees' free choice on unionization; 2) challenges to the representational status of unions that have voluntary recognition before there is a reasonable period of time to permit collective negotiations; and 3) election challenges to long settled representational status of certain unions in the construction industry. The Proposed Rule would: 1) restore the Board's prior law, including longstanding principles reflected in the traditional "blocking charge" first adopted by the NLRB in 1937; 2) the Board's "voluntary recognition" bar doctrine, as refined in *Lamos Gasket Co.*, 357 NLRB 934 (2011); and 3) the Board's approach to voluntary recognition in the construction industry, as set forth in *Casale Industries*, 311 NLRB 951 (1993) and *Staunton Fuel & Material*, 335 NLRB 717 (2001).

Although the deadline for initial comments was supposed to be January 3, 2023, as per the most recent statement from the Board, the new deadline is February 2, 2023.

---

information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

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.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.