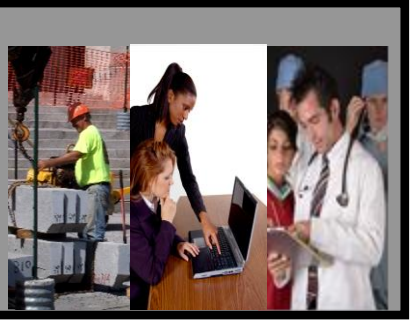
Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
August 17, 2023 Edition



POTENTIAL STRIKE LOOMING FOR METRO-NORTH

As negotiations with Metro-North, operated by the Metropolitan Transportation Authority (MTA), and the Transport Workers Union of America (TWU) have stalled, the union and its members have become vocal in their resolve to strike.

The nearly 600 maintenance workers, car cleaners, and train inspectors represented by TWU Locals 2001 and 2055 have been without a contract for nearly 5 years. The negotiations, being handled through the National Mediation Board, have been hindered by the MTA's unwillingness to remove the opening clause from the collective agreement – a measure that would allow the MTA to unilaterally reopen the contract and make changes post-negotiation to any economic or health benefits.

The union has also expressed that Metro-North, which sees a daily ridership of over 200,000, was held together by its workers during the heights of the COVID-19 pandemic. They worked tirelessly to maintain the health and safety of Metro-North passengers and they are requesting a contract that reflects that work.

According to MTA Spokesperson, Michael Cortez "there is no imminent risk of a strike and to suggest otherwise is extremely misleading". TWU believes otherwise. You can listen to John Samuelsen, International President of TWU, explain the union's fight here.

SECOND CIRCUIT SETS STANDARDS FOR ALLEGING RETALIATION FOR PROTECTED CATEGORIES UNDER TITLE VII

In the precedential decision of *Carr v. NYC Transit Authority*, No. 22-792-cv (2d Cir. Aug. 7, 2023), Judge Parker, joined by Circuit Judges Pooler and Nathan, of the U.S. Court of Appeals for the Second Circuit, clearly delineated the elements needed for a *prima facie* claim of retaliation in violation of Title VII of the Civil Rights Act of 1964. Notably, the retaliatory act need not rise to harassment or discrimination itself, but may merely be "materially adverse," meaning an employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[1]

Carr, an "African American female of Caribbean descent," born in 1955, was passed up for two managerial promotions in 2014 that went to younger white males. After beginning administrative proceedings alleging discrimination based on age, gender and race, Carr added allegations that the NYCTA had created a hostile work environment in retaliation for her complaints. The alleged harassment included increasingly critical

[1] **Three days later, on August 10, 2023, Judge Rosemary Pooler passed from this world, leaving the community she had loyally led and served for 25 years. Pitta LLP mourns the passing of Judge Pooler, comforted by the certainty of her elevation**.

evaluations, heavier assignments, removal of support staff and disrespect from her supervisor. The District Court granted NYCTA summary judgment dismissing Carr's complaint on the grounds that NYCTA demonstrated that the promotions were based on the legitimate non-discriminatory reasons of superior qualifications and that the alleged retaliation was not "sufficiently severe or pervasive" to constitute harassment under Title VII. Carr appealed and the Second Circuit affirmed.

While the Appeals Court's decision tracked the District Court on the promotions, Judge Parker objected that the District Court had fallen into a common error in its standard for evaluating the retaliation claim. He explained that the U.S. Supreme Court had established a uniform definition of a retaliatory act for all the Title VII actions in *Burlington Northern & Santa Fe Wy Co. v. White*, 548 U.S. 53 (2006). Based on differences in the language of the Title VII discrimination and retaliation sections, harassment itself must be "severe or pervasive," but retaliatory harassment need only be "materially adverse," meaning action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," even if less than severe or pervasive. Applying this correct standard, the Second Circuit still affirmed the District Court's summary judgment for the NYCTA on retaliatory harassment because the alleged retaliation – "diminishing performance ratings, not having analysts reporting directly to her, being assigned additional projects, and [supervisor's] hostile tone in emails" – was all the result of uniformly applied workplace policies that would not dissuade a reasonable employee from making a complaint of discrimination, and therefore not "materially adverse."

Carr is notable on several grounds. First, it clarifies the distinction in standards for harassment generally and retaliatory harassment specifically that had eluded many judges and practitioners, including the NYCTA and the District Court below. Second, the Court's standard for retaliatory harassment bears striking resemblance to New York City's harassment standard, focusing on the impact on the reasonable victim rather than a severe or pervasive effect on the workplace. While the action cannot be a "trivial harm" or a "petty slight," the shift in focus to victim perception eases plaintiffs' burden of pleading and proof. This distinction is consistent with judicial findings of retaliation even in the absence of actual discrimination. Finally, judges and practitioners are now fully aware of the correct retaliation standard, and will be held to it.

OSHA FINDS THAT VIOLENT CRIMES ON THE JOB ARE SUBJECT TO RECORDKEEPING

In an opinion letter released August 11, 2023, the U.S. Department of Labor ("DOL") Occupational Safety and Health Administration ("OSHA") held that violent crimes which occur on the job are subject to OSHA's recordkeeping requirements ("Opinion Letter"). (Link here). OSHA issued the May 17, 2023 letter in response to a lawyer's request about his client's driver who was involved in a four-car collision while driving on the job. The motorist exited the car, shot the driver, stole his truck and fled the scene and there was no evidence of wrongdoing by the driver.

Under OSHA's recordkeeping regulation, 29 CFR § 1905.5(a), an injury or illness is work-related if "an event or exposure in the work environment either caused or

contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." Work-relatedness is presumed when the injury results from events in the "work environment" unless an exception applies. Those exceptions include, but are not limited to the fact that an employee was in the work environment but as a member of the general public and not as an employee; the injury or illness surfaced at work but is solely the result of a non-work event; or mental illness, the common cold, or flu. 29 CFR § 1904.5(b). According to the Opinion Letter, OSHA's approach to work-relationship in recordkeeping reflects two principles: that work need only be a causal factor for an injury or illness to be work-related, and that there is a "geographic presumption" for injuries and illness caused by events in the work environment. The presumption covers cases in which an injury or illness results from an event at work that is outside the employer's control, such as a lightning strike, or activities that occur at work not directly related to the job, like horseplay.

Under 29 CFR § 1904.5(b)(6), injuries and illness that occur to an employee who is traveling are considered work related if, at the time of the injury or illness, the employee was engaged in work activities in the interest of the employer, such as traveling to and from customers.

In this underlying scenario, at the time of the collision and shooting the driver was driving a company vehicle and traveling between service calls. Traveling to and from customer contacts is an activity "in the interest of the employer" and considered in the work environment. As to whether such acts of violence should be recorded by employers, under a 2001 rule, violent acts against employees at work are work-related because they would not have occurred had the employee not, as a condition of their employment, been in the position where they were victimized. 66 Fed. Reg. at 5954-5956. Therefore, the Opinion Letter explains OSHA's position that the recordkeeping regulation includes injuries and illness resulting from random acts of violence occurring in the work environment.

Under 29 CFR § 1904, recording of workplace violence is not limited to injuries and illness that are preventable, are within the employer's control, or covered by the employer's health and safety program. As the Opinion Letter highlighted, "[t]he issue is not whether the conditions could have, or should have, been prevented or whether they were controllable, but simply whether they are occupational, *i.e.*, are related to work."

DOCTORS SEEK UNIONIZATION AMID WAVE OF HEALTH-CARE MERGERS

In response to the growing trend of post-pandemic health-care mergers and acquisitions, many private sector doctors, especially those at hospitals, are now turning to unionization to better protect themselves. They are voicing concerns over the diminishing sense of autonomy and deteriorating work conditions which are seen as a direct outcome of these mergers.

A notable step in this direction is the recent move by hundreds of physicians at the Allina Health System in Minnesota who petitioned to unionize with the Doctors Council, a Service Employees International Union affiliate. This initiative is said to be the largest group of organized doctors in the U.S. The rising wave of unionization among doctors is

not just about increased pay or benefits, but a call to address patient care issues caused by health-care decisions made by non-clinicians.

A pivotal change in the healthcare landscape has been the transition of physicians from being supervisors or business owners to employees. This change is largely attributed to acquisitions of physician-owned practices by bigger corporate entities, including hospitals, private equity firms, and insurers. Data from a 2022 study by Avalere Health reveals that acquisitions during the COVID-19 pandemic led to an 84% rise in corporate-owned practices. Consequently, more than half of the nation's doctors were affiliated with hospitals in 2022, a significant increase from just 5.6% in 2012.

This trend of acquisitions is believed to be driven by companies' financial struggles during the pandemic and the ongoing staffing shortages. Pressure to maintain profit margins similar to pre-pandemic levels is likely impacting staff, possibly pushing them toward union representation. It seems that doctors view some decisions made during the pandemic to have been more focused on productivity rather than improved patient care.

Although union activity is not new to the health-care industry, the primary concern will likely be its potential impact on patient care. This cannot be ignored but it will likely need to be balanced against the equally vital concern over systemic issues in health care. This movement follows in large part the tangible positive outcomes of national and local nurse unions to voice their concerns and bring about positive change in working conditions.

Beyond unionization, there is a growing concern around practice consolidations due to antitrust issues, especially for doctors wishing to change employers. However, the issue for many of these doctors in finding alternative employment is that many medical institutions are now owned by dominant entities, with many more merging with larger conglomerates, and their employment options are limited due to overbroad non-compete agreements. While the landscape of healthcare is undergoing a significant shift, the push for unionization among doctors emphasizes their aim to reclaim autonomy, improve their working conditions, and most importantly, ensure the best care for their patients.

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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