Labor & Employment Issues
In Focus

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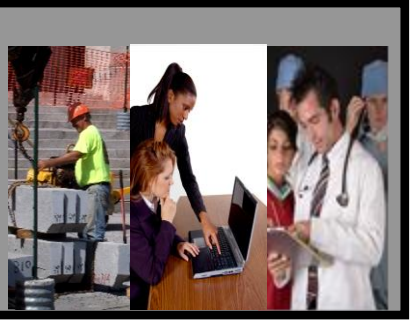

"WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE" – SECOND CIRCUIT, BUTCH CASSIDY

Federal, state and local disability discrimination laws all require an interactive process between the employer and employee in a good faith attempt to find a reasonable accommodation for a disabled employee. The inability of plaintiff, defendant, the district court and three Second Circuit appellate court judges to agree on whether the employer, or employee, fulfilled that obligation in a recent case attests to the challenges of the process and offers some guidance to avoid liability. *Tafolla v. Heilig, Carroll, County of Suffolk*, No. 21-2327 (2d Cir. Aug. 18, 2023) (summary judgment vacated because a rational jury could find the facts in plaintiff's favor).

Kim Tafolla worked as a Clerk Typist for Suffolk County's Special Investigations Bureau. Following an auto accident, she requested that others take over her archiving duties because her "neck, back and ribs were extremely sore." In December 2013, she submitted two medical notes at the County's insistence, one stating "No lifting over 5 pounds" and next line "No bending, pushing exercises," the other later one, "Unable to lift, bend, twist, or push any object over five pounds." Suffolk County agreed Tafolla would not be required to handle objects over five pounds, but insisted she continue archiving that entailed lifting, bending and twisting objects under five pounds. When Tafolla objected about January 7 that the doctor meant over five pounds *or* lifting, bending, twisting, supervisor Carroll reacted angrily, belittled her and said she would have to go on disability leave. Chief Heilig backed Carroll in or about January 16, and HR declined to intervene. Tafolla went on disability leave about January 15, 2014, and a year later, as permitted by the Civil Service Law, the County terminated her employment.

Tafolla sued, alleging discrimination and retaliation in violation of the Americans With Disabilities Act ("ADA") and the New York State Human Rights Law for requesting an accommodation. District Court Judge Seybert granted the County summary judgment, holding that no reasonable jury could find that the County had not reasonably accommodated Tafolla's request to be relieved of five-pound material and, if Tafolla wanted more, it was her burden to follow up. Judge Seybert further held that Tafolla's termination could not be retaliatory because it stemmed from her refusal to accept the County's reasonable accommodation. Tafolla appealed and the Second Circuit panel reversed in a lengthy 2:1 decision by Judge Bianco joined by Judge Perez, with Judge Sullivan vehemently dissenting.

The majority first determined that a jury could find archiving was not an "essential function" of Tafolla's Clerk Typist position, and so an accommodation was required. Next, the majority surmised that the County's five-pound accommodation offer while requiring archiving could plausibly be deemed insufficient by a reasonable jury. While acknowledging the plausibility of the employer's, district court's, and dissent's reading of

the doctor's notes as only limiting the accommodation to five pounds, the majority found that a reasonable jury could read the five pounds and the bending restrictions separately and, therefore, the five pound only accommodation could be insufficient. The majority also concluded, contrary to the district court and dissent, that a reasonable jury could find that Tafolla did not abandon the interactive accommodation process when she took disability leave after hearing from Carroll but before Heilig's response, because it was the County's responsibility to clear up any ambiguities in the medical notes. Judge Bianco explained that, "once the interactive process has been initiated by the employee's request for an accommodation, the regulations contemplate that the *employer* will "use a problem solving approach." (Emphasis added). In any event, a jury could find that Carroll's retort to Tafolla's request to avoid archiving – "'get a box, put it on the floor and sit in [her] seat and get it done' could be reasonably construed by Tafolla as ending the interactive process, which was further reinforced when Tafolla found new files on her desk the next day." Finally, the majority also reinstated the retaliation claims given the proximity of the disability leave leading to discharge to Tafolla's accommodation requests. "We recognize that there are competing inferences that could be drawn from the evidence and that a rational jury could indeed find that Tafolla was at fault ..." but, "construing the evidence most favorably to Tafolla," concluded Judges Bianco and Perez, "these competing inferences ... cannot be resolved by a court on summary judgment."

Judge Sullivan, following Judge Seybert, did not agree. "To my mind," he dissented, "the undisputed evidence in the record establishes that Tafolla was responsible, as a matter of law, for the breakdown of the interactive process." Judge Sullivan stressed Tafolla's deposition testimony that when she left work on January 15, she "had no intention of going back to work," and did not, thereby terminating the accommodation process. Moreover, if Tafolla was dissatisfied with the County's understanding of the medical notes, it was her duty to obtain a clearer medical authorization. Since Tafolla had elected to go on disability before exhausting the accommodation process, the County could not have retaliated against her, he concluded.

The parties' failure to fully communicate during their interactive search for accommodation had dire consequences. The County now faces trial and substantial monetary risk in judgment or settlement. Tafolla lost years of employment and perhaps endured bitter anguish as lawyers and judges grappled with ambiguous facts and slippery legal doctrines. What is clear is that while each side believed it was seeking to reach a reasonable accommodation, neither saw the situation from the other's perspective, and both believed the other was responsible. Both might have benefited had they followed the ADA regulations' advice to "use a problem solving," rather than an adversarial approach.

NLRB CEMENTS HUGE WIN FOR LABOR, PAVING WAY TO UNIONIZATION WITHOUT A FORMAL ELECTION

As "Hot Labor Summer" enters its final leg, the National Labor Relations Board ("NLRB" or "Board") has issued a decision that resurrects an old election policy and lays out new rules for unions seeking recognition. With *Cemex Construction Materials Pacific, LLC* (28-CA-230115) (August 25, 2023) the Board announced a new framework for determining when an employer must recognize and bargain with a union without a Board-run representation election. Now, when a union requests recognition based on a majority of employees in a bargaining unit, an employer has two choices: it can promptly recognize and bargain with the union, or it can file a petition with the Board seeking an election. Importantly, if an employer seeks an election and then commits unfair labor practices to an extent that the election should be set aside, then the petition will be dismissed, and the employer will be forced to bargain with the union.

Specifically at issue in this case was whether Cemex, a "building materials company that provides ready-mix concrete, cement, and aggregates to construction-industry customers," committed such egregious unfair labor practices that the results of a union election, which the Teamsters lost by a margin of 179 to 166, should be set aside and the company forced to bargain with the Union. This is what's known as a "*Gissel*" bargaining order, and it was ordinarily reserved for those situations where an employer committed unfair labor practices to such an egregious extent that holding a fair election was rendered "unlikely." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Here, the Board affirmed the Administrative Law Judge's determinations that Cemex committed serious unfair labor practices and engaged in coercive and threatening behavior in the "critical period" between the filing of a union election petition and the election. However, the Board also announced that it had become persuaded that *Gissel* bargaining orders, by focusing on the potential for an employer's future misconduct, are insufficient at "effectuating ascertainable employee free choice" and "deterring employer misbehavior," the two aims the Supreme Court identified in *Gissel*.

While the new rule announced in the *Cemex* decision is reminiscent of what is known as the *Joy Silk* doctrine, it does not mirror *Joy Silk* exactly. Under *Joy Silk*, 85 NLRB 1263 (1949), *enf'd. in relevant part*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), an employer was required to bargain with a union unless it had a "good-faith doubt" of the union's majority status. Now, under the revised framework, an employer that commits unfair labor practices during a union representation election does so at its peril; the Board hopes that the rule will more effectively deter employers from approaching union election campaigns with the attitude that the consequences of unfair labor practices merely represent the price of avoiding a union at all costs. Chairman Lauren McFerran and Members Gwynne A. Wilcox and David M. Prouty joined in the decision, while the sole Republican member, Marvin E. Kaplan, wrote a partial dissent, wherein he agreed with some of the unfair labor practice findings, but disagreed with others, disagreed that a *Gissel* bargaining order was warranted, and disagreed with what he called his colleagues' "dramatic changes in Board law."

CORNELL STUDENTS WILL HAVE A NEW SOURCE OF CAFFEINE

Last week, Cornell University announced that it will not renew its vendor contract to provide coffee on campus with Starbucks after substantial protest from students over the company's continued labor problems. Most recently, Starbucks closed all three of its Ithaca, New York (Cornell's home) locations in response to unionization efforts, largely organized by Cornell students. Loss of such a large client--Cornell has approximately 16,000 undergraduate and graduate students, in addition to faculty and staff--could be a major loss for Starbucks.

With more than 9,000 company owned stores in the United States, Starbucks is the nation's largest coffee company. Starbucks employees at more than 300 stores across the nation have successfully unionized under Starbucks Workers United since 2021, joining employees at national companies like Amazon and Trader Joe's making organizing efforts.

The current Cornell contract runs through 2025, but the University has said that it would begin the process of selecting a new coffee vendor. Despite ample evidence to the contrary in the form of repeated findings by the National Labor Relations Board ("NLRB"), Starbucks insists that it respects the rights of their employees to unionize and are committed to engaging in good-faith collective bargaining. Conversely, efforts by Cornell's student body which resulted in the University's action are a potential new strategy for union organizers as students at a University amount to a group of powerful consumers.

NLRB ISSUES NEW RULE CLEARING THE WAY FOR QUICKER UNION ELECTIONS

On August 24, 2023, the National Labor Relations Board ("NLRB" or "Board") issued a new rule finalizing changes to the union election process. The rule restores changes made during the Obama administration and eliminates changes made by the Board when controlled by Trump appointees.

Under the new rule, elections are to be held even if related litigation, such voting eligibility and unfair labor practices, is unresolved. Further, pre-election hearings will start in 8 calendar days after the Notice of Hearing is served instead of 14 business days. Regional Directors have the discretion to postpone a pre-election hearing for up to 2 business days, where before Regional Directors could postpone for an unlimited amount of time. The non-petitioning party's Statement of Position is now due the business day before the start of the pre-election hearing, as opposed to 8 business days after the Notice of Hearing is served under the Trump Board's rules. Regional Directors can postpone the due date of the Statement of Position up to 2 days. Under the new rule, the petitioner will respond orally to the non-petitioner's Statement at the start of the pre-election hearing.

Also, the employer now has 2 business days after being served the Notice of Hearing to post a Notice of Petition for Elections in a conspicuous place in the workplace

and to email it to employees. Parties may file post-hearing briefs only with the Regional Director's permission as opposed to having 5 business days under the old rule which could be extended up to 15 days. Further, Regional Directors are to specify elections details – type, dates, times, locations – in their decisions and directions of elections. And finally, elections are to be scheduled for "the earliest date practicable" instead of the 20 business day waiting period under the old rule.

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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