Labor & Employment Issues
In Focus

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RIF RIVEN BY COMPARATOR QUESTIONS MUST BE TRIED TO A JURY, NOT SUMMARY JUDGMENT

Citing "economic headwinds," some companies are turning to Reduction in Force programs ("RIF"). A recent decision from the Eastern District of Pennsylvania cautions that these programs carry their own risks as the federal district court denied an employer's motion for summary judgment citing issues of fact. *Higgins v. MetLife, Inc*., E.D. Pa. 22-3714 (8/17/23).

Matthew Higgins worked for MetLife and its predecessor as an industrial research analyst since 2007. MetLife terminated Higgins at age 54 in a 2020 RIF, but retained two junior analysts aged 35 and 26. Higgins cited the retention of the two younger analysts as comparators proving age discrimination, but MetLife moved for summary judgment on the grounds that the two younger analysts had junior duties and so were not valid comparators. Federal District Court Judge Wendy Beetlestone denied MetLife's motion and sent the case to trial by jury, explaining that whether the two juniors were sufficiently "similarly situated" to Higgins to be treated as valid comparators presented a fact intensive inquiry that a jury must decide.

Higgins illustrates the pitfalls that bedevil any RIF. Companies frequently terminate the most costly employees, who typically are older than their less expensive juniors. Even when an employer documents the need and legitimate criteria for the RFI, any gray areas may give rise to a fact inquiry precluding summary judgment and requiring a jury trial. In that trial, the jury may turn glassy eyed at the "similarly situated" analysis, but revert happily to basic math, such as 54-35 or 54-26.

GOVERNOR HOCHUL SIGNS LAW BANNING CAPTIVE AUDIENCE MEETINGS

On September 6, 2023, New York Governor Kathy Hochul gave unions a belated Labor Day present, signing a bill (Assembly Bill A6604 / Senate Bill S4962) banning captive audience meetings. A captive audience meeting is a mandatory meeting wherein the employer or an agent attempts to persuade employees against unionization. The Bill bans captive audience meetings by adding "labor organization" to the state labor law's definition of "political matters." The bill allows employees to refuse to attend employer-sponsored meetings "the primary purpose of which is to communicate the employer's opinion concerning religious or political matters" or listen to speeches or any communications the primary purpose of which is to communicate the employer's opinion concerning political or religious matters. Effective immediately, an employer cannot refuse to hire or employ, discharge, or discriminate against an employee because they refuse to attend a captive audience meeting.

With the passage of the bill, New York joins Connecticut, Maine, Minnesota, and Oregon in banning captive audience meetings. Further, in an April 2022 memorandum,

National Labor Relations Board General Counsel Jennifer Abruzzo argued that captive audience meetings violated federal labor law as they are inconsistent with employees' free choice. While the memorandum has survived challenges in two federal courts, the National Labor Relations Board has yet to decide whether such meetings violate the National Labor Relations Act. Connecticut's captive audience meeting ban is currently being challenged in federal court by the U.S. Chamber of Commerce.

NATIONAL LABOR RELATIONS BOARD SAYS ADVOCATING ON BEHALF OF NONEMPLOYEES IS PROTECTED CONCERTED ACTIVITY

Section 7 of the National Labor Relations Act ("NLRA" or "Act") protects "concerted activity" with a purpose of "mutual aid or protection." In a decision issued August 31, 2023, the National Labor Relations Board ("NLRB" or "Board") returned to longstanding precedent that concerted activity by statutory employees on behalf of nonemployees counts as protected concerted activity or mutual aid or protection where the activity can benefit the statutory employees. The decision is *American Federation for Children, Inc.*, 372 NLRB No. 137, and it reversed the Board's 2019 decision in *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019), *rev. denied sub nom*, *Jarrar v. NLRB*, 858 F. App'x 374 (D.C. Cir. 2021) (unpublished).

Specifically at issue in this case was whether Charging Party Sarah Raybon, an employee of the Respondent American Federation for Children, was engaging in protected concerted activity when she advocated among coworkers on behalf of Gaby Ascencio, a former colleague who was awaiting renewal of her work authorization status. Raybon attempted to rally support for Ascencio's rehire. Applying *Amnesty International*, the Administrative Law Judge found that this activity was neither "concerted" nor "for the purpose of mutual aid or protection" because *Amnesty* held that "employees' advocacy on behalf of persons who are not statutory employees under the Act, even if they are working alongside the employees in the same workplace, cannot be viewed as being for the mutual aid or protection of the employees themselves within the meaning of Section 7."

In reversing, the Board explained that the sort of effort extended by Raybon on behalf of Ascencio does qualify under the statutory concept of "mutual aid or protection" because such efforts can improve employees' own working conditions or lead nonemployees like Ascencio to return the help they have received if they return to the job: "Standing in solidarity can be a protected act regardless of the employment status of those you stand with—the question is simply whether, in helping others, employees might help themselves and get help in return."

Chairman of the Board Lauren McFerran, recently re-confirmed Member Gwynne Wilcox, and Member David Prouty joined in the decision. Republican appointee Member Marvin Kaplan dissented, opining that his colleagues "once again purport to overrule precedent in a case where the issue is not relevant to deciding the case before the Board." He would have found that Ascencio was a statutory employee because, as the Board unanimously found, she never lost her employee status and thus "the facts [did] not present an *Amnesty International* issue."

GWYNNE WILCOX CONFIRMED FOR SECOND TERM ON NATIONAL LABOR RELATIONS BOARD

Gwynne Wilcox, a long-time partner at New York union side labor and employment law firm, Levy Ratner, was last week confirmed by the Senate by a narrow 51-48 vote for a second, full five-year term on the National Labor Relations Board. The vote was mostly along party lines, with the exception of Senator Joe Manchin (D-WV) opposing the nomination while two Republican Alaska Senators, Lisa Murkowski and Dan Sullivan voted in favor. During her time in private practice, Wilcox represented the Service Employees International Union ("SEIU") in its successful "Fight for Fifteen," and advocates worker organizing efforts. She is the first black woman on the Board in its 85-year existence.

The Board currently maintains a 3-1 Democratic advantage as the White House has engaged in long term negotiations with Republicans in the Senate to identify an acceptable Republican member to fill the remaining Board seat. As Wilcox's first term expired in August, the Board issued a series of significant decisions before her time was up. These cases included *Cemex Construction Materials Pacific LLC* reported on in a recent *In Focus*, which serves to prevent employer misconduct in the lead up to union elections via the threat of NLRB bargaining and recognition orders. Chairperson Lauren McFerran will be the next board member to face a term expiration in December 2024.
