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LABOR & EMPLOYMENT ISSUES

IN FOCUS

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JANUARY 18, 2024 EDITION

"F**CKING" "RACIST," "STALKER," "FRAUD," NOT DEFAMATORY IN CONTEXT, SAYS SECOND CIRCUIT

Plaintiff Michael Rapaport and Defendant David Portnoy with his company "Barstool" all deserved each other, according to Circuit Judges Wesley, Chin and Bianco. "[I]n the context of a hostile, vulgar and hyperbolic feud, between them, even accusations of racism and stalking would not be understood by reasonable people as true facts," explained the Court, and therefore could not be actionable defamation. *Rapaport v. Barstool Sports Inc.*, No. 22-2080-cv (Jan. 9, 2024).

Michael Rapaport is an actor/comedian known for his "unfiltered views" and "rants" on Twitter, Instagram and YouTube. Barstool is a media company and comedy brand, also "unfiltered," that "people love [known as "stoolies"] or love to hate." Rapaport and Barstool entered into a "talent agreement." Within months, Rapaport and Barstool employees began publicly trading crude insults, culminating in Rapaport tweeting to one, "if you call yourself a f**cking stoolie for real, you've already lost in life." Barstool fired Rapaport for insulting "our entire f**king fan base." Portnoy and company then unleashed online statements calling Rapaport a racist and fraud, who stalked his girlfriend, and has herpes, all delivered by Barstool's usual memes of the talking lesion and the anthropomorphic cracker. They all sued each other, Rapaport alleging defamation. The District Court granted Barstool summary judgment and Rapaport appealed.

The Court's analysis began calmly enough. After recounting the facts, a court weighs whether statements are factual representations and therefore actionable, or non-actionable opinion; the Judges stressed that New York courts give careful attention to the full context of the statement and the forum where made. In that context, the Second Circuit agreed with the District Court that:

> [T]he statements were largely laden with epithets, vulgarities, hyperbole, and non-literal language and imagery; delivered in the midst of a public and very acrimonious dispute ... obvious to even the most casual observer; and published on social media, blogs and sports talk radio, which are all platforms where audiences reasonably anticipate hearing opinionated statements.

The Court of Appeals therefore affirmed summary judgment for Barstool because "the district court carefully and correctly determined ... that no reasonable reader or listener would have viewed any of the challenged statements to be conveying any expressed or implied facts ..."

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The parallel to "public and very acrimonious" labor disputes is also obvious. In such battles, labor and management often resort to rough language and graphic imagery, which the public should reasonably suspect is biased opinion. To that extent, labor counsel may draw on this case in defense of sometimes overzealous campaigning. However, the Second Circuit explained that in defamation analysis, no one factor is dispositive. In that context, statements that look like factual representations and are made without accompanying true basis may still result in very real liability.

NORTHERN DISTRICT OF NEW YORK JOINS SECOND CIRCUIT AND SOUTHERN DISTRICT IN UPHOLDING LOCAL LAWS AFFECTING TERMS AND CONDITIONS OF EMPLOYMENT

In *Home for the Aged of the Little Sisters of the Poor v. McDonald*, N.D.N.Y. No. 1:21-cv-1384 (BKS), Chief Judge Brenda K. Sannes added her Court to the list of those upholding state or local laws affecting terms and conditions of employment rejecting constitutional and preemption challenges. Judge Sannes' lucid, comprehensive analysis adds strength to advocates of state and local action in this area given Congressional paralysis.

Despite the very sympathetically named lead plaintiff, this action was brought by 250 nursing home operators and three trade associations ("Plaintiffs") to challenge New York State legislation and regulations imposing caps on profits and requiring reinvestment in patient care by additional staffing. Plaintiffs argued that the New York State Department of Health violated the takings and due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution and the Eighth Amendment's prohibition against excessive fines. In addition, Plaintiffs claimed that the legislation/regulations were preempted by both federal Medicare/Medicaid regulations and the National Labor Relations Act ("NLRA"). Judge Sannes would have none of it.

Judge Sannes dismissed the "as-applied" takings, fines and due process claims without prejudice to renew "if these claims become ripe." She found these claims premature because the law had not yet been applied to any of the Plaintiffs, notwithstanding their concern that impositions were imminent. The Court likewise dismissed Plaintiffs' arguments of unconstitutionality for lack of due process on the law/regulations, but with prejudice, because legislative enactments are not subject to procedural due process questions, and the enactments' legislative history and purpose addressed a strong public policy sufficient to meet the minimum scrutiny rational basis test.

The Court also roundly rejected Plaintiffs' preemption arguments, dismissing them with prejudice as well. Judge Sannes found no Medicare/Medicaid preemption because the federal and state laws were clearly intended to work together and did so in practice. As to NLRA *Machinist* preemption, which "forbids states and localities from intruding upon

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the labor-management bargaining process," *Machinists v. Wisconsin Employment Relations Board,* Plaintiffs claimed that the law/regulations superimposed artificial and arbitrary spending and staffing mandates forcing them to spend more money or hire more staff, thereby affecting the collective bargaining process itself. They explained that the mandates "effectively strip" nursing homes of the ability to ensure that they do not violate the law's caps during or after negotiating a collective bargaining agreement. But Judge Sannes held that "wages and staffing levels are substantive terms," not process, because they do "not favor or disfavor collective bargaining, eliminate particular bargaining tools or dictate the details of particular contract negotiations." Citing Second Circuit precedent, Chief Judge Sannes concluded that "the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of preemption by the NLRA."

Home for the Aged brings the Northern District of New York squarely in line with the Second Circuit and Southern District. Employer challenges to state or local enactments affecting terms and conditions of employment on constitutional or preemption grounds will thus need to surmount substantial judicial obstacles. Nevertheless, given the stakes and past experience, such challenges will likely continue so long as state or local legislatures pursue the public welfare in labor matters.

GOOGLE PURPOSELY REFUSED TO BARGAIN WITH YOUTUBE EMPLOYEES, WILL LIKELY CHALLENGE JOINT-EMPLOYER DECISION IN FIFTH CIRCUIT

The National Labor Relations Board ("NLRB" or "Board") held that Google, as joint employer along with Cognizant Technology Solutions, illegally refused to bargain with the Alphabet Workers Union—Communications Workers of America, Local 9009 ("Union"). The case is *Cognizant Tech. Sols. U.S. Corp. and Google LLC, N.L.R.B.*, Case 16-CA-326027, Jan.3, 2024. While Cognizant denied that it refused to bargain with the Union, Google admitted it; both employers contest the validity of the Union's certification. But those arguments were already raised and rejected, the Board said.

The Union was certified on May 4, 2023, after YouTube workers voted 41-0 in favor of certification. The workers were hired through Cognizant, a staffing agency, but a Regional Director determined that Google possessed and exercised "such substantial direct and immediate control over the employees' supervision, benefits, and hours of work" to find that Google meaningfully affected matters relating to the employment relationship with those employees. This finding of joint-employer status was based on the Trump-era standard, which the current Democratic majority is replacing with a more worker-friendly standard, effective February 26, 2024.

Federal labor law does not provide for direct appeals to NLRB election decisions, only to unfair labor practice decisions. Thus, it is likely that Google's refusal to bargain

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was a procedurally strategic move to create this separate unfair labor practice case, which can now be directly challenged in Federal court. Moreover, because the YouTube workers are located in Texas, Google can now file its appeal in the conservative, employer-friendly Fifth Circuit, where a group of business advocacy groups are already challenging the new joint-employer regulation. See *US Chamber of Commerce v. NLRB*, E.D. Tex., No. 6:23-cv-00553, Complaint filed Nov. 9, 2023.

TRADER JOE'S UNION MAY USE COMPANY LOGO ON UNION MERCHANDISE

This week, a federal court in Los Angeles ruled against Trader Joe's on its innovative theory that the Union organizing its workers cannot identify itself as connected to Trader Joe's. As a result, using a very traditional theory, the Court dismissed the grocery giant's trademark lawsuit.

United States District Judge Hernan Vera said that Trader Joe's United's use of the chain's name and logos on tote bags, buttons, mugs and the like would not result in customer confusion, the standard guideline in a trademark infringement case. Vera also said that the lawsuit was "dangerously close" to being frivolous or improper, and that it "strains credulity" to think it would have been filed "absent the ongoing organizing efforts that Trader Joe's employees have mounted (successfully) in multiple locations across the country." Trader Joe's sued the union last year, arguing its merchandise was likely to confuse customers into thinking the chain made or endorsed it. The judge said that the union's designs were not similar to the store's trademarks and noted that the only place customers can buy the union's merchandise is through its website, which is "openly critical of Plaintiff's labor practices," thus placing important context around the use of the image. The case is *Trader Joe's Co v. Trader Joe's United*, U.S. District Court for the Central District of California, No. 2:23-cv-05664.

This is the latest in a number of cases in which employers attempted to stop unions from using company trademarks in the context of labor disputes, efforts which have failed.

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