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LABOR & EMPLOYMENT ISSUES

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EMPLOYER UNION UNWISELY BORROWS FROM MANAGEMENT PLAYBOOK IN DEALING WITH UNION-REPRESENTED UNION REPRESENTATIVES, VIOLATES NATIONAL LABOR RELATIONS ACT

At issue in a recent decision by an Administrative Law Judge ("ALJ") for the National Labor Relations Board ("NLRB" or "Board") was whether a United Food and Commercial Workers Local ("UFCW Local 7" or "Employer"), violated the National Labor Relations Act ("NLRA" or "Act") when it invited employee organizers who expressed concerns about working conditions to either "suck it up" or quit. The Employer was also accused of violating the Act by confiscating employees' work equipment, suspending grievance proceedings, and refusing to bargain in good faith with the union employees' Union, the Federation of Agents & International Representatives Union ("Fair"). The case is *United Food & Com. Workers Local 7*, No. 27-CA-298239 (Feb. 8, 2024).

The trouble began in January 2022, when UFCW Local 7 representatives and organizers assisted with a 9-day strike at King Soopers grocery stores in the Denver, Colorado metro area. Organizers and representatives worked between 60 and 100 hours per week for weeks leading up to and during the strike. The strike itself also presented bleak working conditions – long hours in below-freezing temperatures and snow, incorrect paperwork, a digital system that did not work, and general disorganization. At a meeting following the strike, employees voiced concerns about their lack of preparation and training in addition to the frustrating conditions leading up to and during the strike. The Employer's response to these concerns was what the ALJ characterized as "either suck it up . . . or work somewhere else." This response violated Section 8(a)(1) of the Act because it reasonably tended to interfere with employees' free exercise of their Section 7 right to engage in protected concerted activities, which includes voicing concerns about working conditions.

The Employer also violated the Act during contract negotiations with FAIR in June and July of 2022. First, the Employer unlawfully confiscated FAIR-represented employees' work equipment, such as laptops, tablets, and key fobs, and required those employees to check-out and check-in their equipment each day. Union representatives were not allowed to take equipment out of the office and suddenly found themselves conducting union business on paper for the first time in several years. Also, because the Employer also confiscated work credit cards, representatives now had to charge work expenses to their personal credit cards and then seek reimbursement. The stated reason for confiscating the equipment was because the collective bargaining agreement between the Employer and FAIR had expired; because the parties had not reached a new agreement, UFCW feared the employees might strike. The ALJ found this action to be coercive in violation of Section 8(a)(1), a material and substantial unilateral change to the

employees' working conditions in violation of Section 8 (a)(5), and unlawful discrimination of FAIR-represented employees under Section 8(a)(3).

In addition, UFCW Local 7 violated the Act when it stopped processing grievances after the expiration of the collective bargaining agreement, erroneously claiming that because the contract expired, there was no grievance procedure in place. However, as UFCW Local 7 likely should have known, although a party's obligation to *arbitrate* only continues after a contract has expired when the underlying grievance arose before the contract's expiration, parties have a continuing obligation to follow established grievance procedures even after a contract has expired. Thus, the Employer's refusal to process grievances also violated the Act.

The ALJ ordered the Employer union to bargain with FAIR, demanded that it process all grievances dating back to 2022, and ordered it to cease and desist from making unlawful statements and unilaterally changing workplace policies.

SECOND CIRCUIT REVIVES HIJAB DISCRIMINATION CLAIM

In *Billings v. Murphy*, No. 22-2010-cv (2d Cir. Feb. 6, 2024), a panel of the U.S. Court of Appeals for the Second Circuit revived the religious discrimination claims of a Muslim female state employee for religious accommodation that had been dismissed by the District Court. The panel's reasoning provides instruction as to accommodation law and pleadings.

Maureen Billings is a practicing Muslim who sincerely believes she must wear a full-length "hijab" head covering in the presence of all men outside her family. While employed by the New York State Department of Corrections and Community Supervision ("DOCCS"), Billings requested an accommodation to wear her hijab at work. DOCCS granted the requested accommodation on condition that the hijab could be inspected to assure it would come off if pulled by an inmate. Billings agreed, but balked when her male supervisor insisted he would inspect the hijab, causing her severe anxiety attacks. The federal District Court granted DOCCS motion to dismiss Billing's retaliation and discrimination claims and Billings appealed.

Judges Jacobs, Lohier, Jr., and Nardini of the Second Circuit reversed on two major grounds, reviving Billings' claims. The District Court had dismissed the discrimination claims because, it reasoned, the Second Amended Complaint ("SAC") did not allege "adverse employment action." However, explained the Appeals panel, failure to accommodate absent undue hardship could itself constitute the adverse action. "Contrary to the District Court's holding," reasoned the panel, "Billings was not required to allege an *additional* adverse employment action ..." Second, although Billings suffered removal from payroll for several months, the District Court held that Billings did not raise an inference of discrimination. But the Appeals Court stressed a plaintiffs' "minimal burden" in a motion to dismiss, and found Billings met that low standard given that she was removed from payroll only months after beginning to wear her hijab.

Billings is significant in setting a low bar on a failure to accommodate claim, the employer's unreasonable refusal sufficing as discriminatory harm *per se* without more. Coupled with procedural rules disfavoring motions to dismiss, more cases like this one are likely to go through discovery, to summary judgment or trial.

OSHA'S WORKPLACE WALKAROUND POLICY UNDER REVIEW BY THE WHITE HOUSE

The U.S. Occupational Safety and Health Administration's ("OSHA") proposed rule that would allow union representatives to accompany OSHA inspectors at job sites is before the White House for a last review before a final rule is issued.

Under the Occupational Safety and Health Act ("Act"), a representative authorized by employees have the opportunity to join Compliance Safety and Health Officers ("CSHO") of the U.S. Department of Labor during physical inspections of workplaces for the purpose of aiding such inspections. According to federal regulations, CSHOs "are authorized to enter without delay and at reasonable times any … area, workplace or environment where work is performed by an employee of an employer[] to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, The proposed rule would amend OSHA's Representatives of Employers and Employees regulation to clarify that representatives authorized by employees may be an employee of their employee or a third-party. The Act states that the authorized employee representative "shall" be an employee of the employer being inspected. However, the Act also allows a third party if the CSHO determines there is "good cause shown why their presence is reasonably necessary to conduct an effective and thorough physical inspection of the workplace." OSHA is seeking to clarify the rule that for purposes for the walkaround inspection, the representative authorized by the employees may be an employee of the employer or, when they are reasonably necessary to aid in the inspection, a third party. According to OSHA, this would include union representatives. On jobsites with mixed union and non-union workers, the proposed rule would allow the non-union workers to select a union official. The proposed rule would also allow non-union employees to designate a worker advocacy group or labor union to be their representative in an OSHA inspection.

If finalized, the rule would mirror OSHA's walkaround inspection policy from President Obama's administration, which was overturned by a federal judge and revoked by President Trump in 2017.

HAPPY PRESIDENTS DAY

"All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other."

Abraham Lincoln

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