



# Labor & Employment Issues In Focus

Pitta LLP  
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April 25, 2019 Edition



## **STATE COURTS JOIN IN UPHOLDING UNION EXCLUSIVE BARGAINING RIGHTS POST JANUS**

Federal courts have consistently rejected attempts to apply dicta from the Supreme Court's decision in *Janus v. AFSCME*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (2018) to undermine union rights to exclusive representation of the bargaining unit. Two recent decisions from Massachusetts and Pennsylvania indicate that "blue" state courts are following that pattern. *Branch et al. v. Commonwealth Employment Relations Board*, Case No. SJC-12603 (April 9, 2019) (non-members may be excluded from bargaining table); *Aneglucchi v. Pennsylvania Labor Relations Board*, Case No. 75 C.D. 2018 (April 2, 2019) (decertification petition must include union non-members).

Writing for a unanimous Massachusetts high court in *Branch*, Justice Scott L. Kafker minced no words in rejecting the non-member's arguments advanced by the National Right to Work Foundation ("NRWF"). First, the Court firmly stated that exclusive representation is "necessary to effectively and efficiently negotiate collective bargaining agreements and thus promote peaceful and productive labor-management relations." Next, the Court ruled that *Janus* dicta did not reverse an "uninterrupted line" of judicial precedent acknowledging exclusive representation, repeated in *Janus* itself. Finally, the Court rejected the non-members' argument that excluding them from the bargaining table impaired their First Amendment right not to join a union. They exercised that right, noted the Court, in voting against the teachers' unions and declining membership; Unions still owed them a duty of fair representation but that duty to all members "has not been found to apply to how the union selects its negotiators and develops its proposals."

In *Angelucchi*, the Pennsylvania intermediate appeals court affirmed exclusive representation from a different angle. In that case, union opponents sought to decertify AFSCME by filing a petition signed by over 30% of union members, as opposed to 30% of bargaining unit members. Applying Pennsylvania state labor law, the Court held that the principle of exclusive representation required that all unit members must participate in the petition, which now fell short of the requisite 30% of all unit employees.

It cannot be overlooked that post *Janus*, state governmental employees' unions face challenges to their existence in state as well as federal courts. These two decisions therefore provide welcome assurances that at least these "blue" states "will continue to defend against efforts to undermine the rights of working people..." as vowed by the Massachusetts Attorney General, and "work with unions to ensure the effective delivery of government services..." In counterpoint, however, NRWF promised continuing lawsuits and appeals to "clarify the issue of forced association with a union and its compatibility, or likely lack of compatibility, with individual worker's First Amendment rights."

## **NLRB SUCCESSORSHIP PENDULUM SWINGS BACK TOWARDS EMPLOYERS**

In yet another switch from established precedent, in a 3-1 decision released April 2, the National Labor Relations Board (“NLRB” or “Board”) reversed decades of precedent regarding a successor employer’s bargaining obligations following the purchase of an entity with a unionized workforce. The split Board held that the new owners of a skilled nursing facility did not have to bargain with a preexisting union before changing work conditions, though it should have recognized the union. The Board’s decision in *Ridgewood Health Care Center, Inc.*, 10-CA-113669 and 10-CA-136190 (Apr. 2, 2019) significantly reined in the application of the “perfectly clear successor” doctrine, which requires a successor employer to maintain the status quo of its predecessor employer’s terms and conditions of employment under certain circumstances. The Board’s return to the narrow application of the perfectly clear successor doctrine will undoubtedly benefit successor employers in escaping perfectly clear successor liability.

Pursuant to the Supreme Court’s decision in *NLRB v. Burns Security Services*, the NLRB applies a two-part test when determining whether an employer is a “successor” employer under the National Labor Relations Act, and therefore has a duty to bargain with the union representing the employees of its predecessor. Generally, even if an employer is a successor employer under this two-part test, it is still free to set the initial terms and conditions of employment for bargaining unit employees prior to bargaining with the union, and therefore is not required to abide by the terms and conditions of employment set forth in the predecessor employer’s collective bargaining agreement.

The Board agreed with an administrative law judge's finding that Ridgewood Health Care Center Inc. and Ridgewood Health Services Inc. (“Ridgewood”) were required to recognize the United Steelworkers union that had bargained with the nursing facility's previous ownership. As a single employer, the companies satisfied a two-part test for determining whether an entity is a successor with bargaining obligations, under *Burns*, with the Board holding that there was no dispute that the facility's business operations largely remained the same, satisfying the first prong of the test, and that a majority of the new workforce would have come from the earlier bargaining unit had it not been for Ridgewood's anti-union animus in hiring, satisfying the second prong.

However, the Board rejected the administrative law judge's conclusion that Ridgewood should have bargained with the union before imposing new employment conditions, such as wages. The Board held that the Supreme Court carved out a narrow exception to this test in the *Burns* decision, whereby a successor employer is bound by the terms of the predecessor employer’s collective bargaining agreement if it is determined that the successor employer is a “perfectly clear successor.” In the *Burns* decision, a successor employer is deemed a perfectly clear successor if the employer retains, or would have retained absent discriminatory motives, all or substantially all of its predecessor’s bargaining unit employees.

In *Ridgewood Health Care Center*, the Board expressly overruled subsequent interpretations of the “perfectly clear successor” standard, which it contends impermissibly expanded the scope of this narrow exception. Specifically, the Board overruled its 1996 decision in *Galloway School Lines*, wherein it determined that the perfectly clear successor standard also requires a successor employer to bargain over the initial terms and conditions of employment “where, although the employer’s plan is to retain a few [*sic*] number of predecessor employees,

it is still evident that the union's majority status will continue" and the successor provides no notice of a change in terms of employment prior to hire.

Returning to the application of the narrow exception set forth in *Burns*, the Board determined that the successor employer in *Ridgewood Heath Care Center* was not a perfectly clear successor since "only" sixty-five of the eighty-three bargaining unit members applied for jobs, and only fifty-one of them received offers. Although the Board found that at least four bargaining unit members did not receive offers of employment due to anti-union discriminatory motives, this refusal "created no uncertainty whether the [successor employer] planned to retain all or substantially all of the predecessor's unit employees."

Writing in dissent, NLRB Member Lauren McFerran argued that Ridgewood was a "textbook example of a perfectly clear successor." Ridgewood had told the unit members that it intended to hire 99.9% of them, keep their employment conditions the same and even at one point that it would bargain with the union for a new contract, McFerran said. The company misled the workers into thinking that everything would remain the same and then "pulled the rug out from under them," she asserted. "This decision, then, is yet another unfortunate example of using a straightforward case as a jumping off point to overrule well-established precedent," McFerran charged.

### **SECOND CIRCUIT PANEL HOBBLER ADA PLAINTIFFS BY REPLACING "MIXED MOTIVE" WITH RESTRICTIVE "BUT FOR" STANDARD**

On April 18, 2019, the United States Court of Appeals for the Second Circuit issued a 2-1 decision that will make it more difficult to establish disability discrimination in its jurisdiction. *Natofsky v. City of New York*, No. 17-2757 (2d Cir. Apr. 18, 2019). A divided panel of the Court held that, under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, a plaintiff must allege that an adverse employment action would not have been taken "but for" the individual's disability.

Plaintiff Richard Natofsky served as the Director of Budget and Human Resources at the New York City Department of Investigation ("DOI") from December 2012 until March 2014, when he was demoted. Natofsky suffers from a hearing disability and, in order to fully understand what someone is saying, needs to focus intently on the speaker and read lips. Natofsky's supervisor, Shaheen Ulon, raised concerns about his job performance in 2013 regarding responsiveness to emails. Natofsky contended that his late replies were due to his inability to review emails while in meetings because of his need to focus on speakers. In early March 2014, new DOI Commissioner Mark Peters and Chief of Staff Susan Pogoda met with Ulon and Natofsky. Peters expressed frustration with their inability to answer how many additional people he could hire based on the budget. Pogoda called Ulon and Natofsky "clueless." Ulon's position was eliminated shortly thereafter due to reorganization under the new commissioner, but before leaving she completed an evaluation of Natofsky and rated him two out of five, with complaints about untimely completion of tasks and email responsiveness. In May 2014, Pogoda informed Natofsky that he was being demoted, resulting in a decrease in pay of around \$60,000.

Natofsky filed a complaint alleging that the City, Pogoda, Ulon, and Peters violated the Rehabilitation Act by discriminating against him on the basis of disability. The District Court granted defendants' summary judgment motion, in part because Natofsky could not

demonstrate that bias was “the sole reason” for any of the adverse employment actions he experienced.

On appeal, Judges Walker and Keenan of the Second Circuit panel concluded that the appropriate standard under the Rehabilitation Act is not the most restrictive “sole reason” test, despite the Rehabilitation Act’s text stating the same, but still affirmed the district court’s dismissal under a “but for” standard they read into the statute. Reviewing two decades of development, the panel majority discussed a 1992 amendment which conformed the Rehabilitation Act to the ADA, for which the Second Circuit historically applied a “mixed-motive” analysis, i.e. disability only needed to be one motivating factor in an employer’s adverse action. The mixed-motive test derived from a 1991 Congressional amendment to Title VII that most circuit courts began applying to the ADA. However, in 2009 the U.S. Supreme Court held that mixed-motive analysis did not apply to the Age Discrimination in Employment Act (“ADEA”) because the ADEA’s text differed from Title VII. Rather, the Supreme Court held that “but for” causation applied, requiring a plaintiff to demonstrate that its employer would not have taken the action “but for” the individual’s age. In 2013, the Supreme Court continued to chip away at mixed motive, holding it inappropriate for Title VII retaliation claims based on the statute’s text. Observing the trend, the Second Circuit panel joined the Fourth, Sixth, and Seventh Circuits in interpreting the ADA to require the more restrictive “but for” causation standard. Applying the same, the Court concluded that Natofsky could not show that his demotion would not have happened if not for his disability, noting Pogoda’s view that Natofsky was clueless and the reorganization of the DOI under the new commissioner.

Judge Chin dissented, arguing that the mixed motive standard applied by the Court for more than two decades remained good law for disability discrimination claims. Judge Chin agreed that the Rehabilitation Act incorporated the ADA standard. However, he distinguished the Supreme Court’s 2009 ADEA decision, noting that unlike the ADEA, the ADA incorporates the powers, remedies, and procedures of Title VII. Thus, he argued that the Rehabilitation Act should be treated like Title VII, where “but for” causation applies to retaliation claims but mixed motive applies to discrimination and failure to accommodate claims.

Given that the majority consisted of two Republican appointees, plaintiff may petition for full Second Circuit review. If granted, any decision would lay open an ideological divide in the Court of Appeals. In addition, a full court return to mixed motive analysis would create a circuit court split which the Supreme Court may opt to decide on its own.

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