



Labor & Employment Issues In Focus

Pitta LLP
For Clients and Friends
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NLRB FINDS THAT NEW YORK HOSPITAL UNLAWFULLY FIRED NURSE WHO LEFT SURGERY

On December 5, 2022, the National Labor Relations Board (the “Board” or NLRB”) found that New York Presbyterian Hudson Valley Hospital (the “Hospital”) illegally fired a nurse who left the operating room during spinal surgery to engage in union activity. *New York Presbyterian Hudson Valley Hospital*, 372 NLRB No. 15 (Dec. 5, 2022). Chairman McFerran and Member Prouty were in the majority with Member Ring dissenting.

The New York State Nurses Association (the “Union”) was certified by the Board as the exclusive collective bargaining representative of a unit of registered nurses at the hospital in December 2018. During the events herein, the Hospital and Union were bargaining for an initial contract and the fired nurse, Rosamaria Tyo, was selected to be a member of the Union’s negotiating committee.

Tyo, a 17-year employee, was assigned to train new operating room nurses to document surgeries. On February 25, 2020, Tyo was assigned to train Kevin Lazaro, another registered nurse, in a complex surgery. Tyo and Lazaro were to relieve each other for 15-minute breaks and a floating nurse was to relieve them both for their 30-minute lunch breaks.

During the surgery, Tyo was told that a group of Union agents and employees were on-site and ready to engage the Chief Nursing Officer (“CNO”). Tyo asked Lazaro if he was comfortable documenting the surgery and he agreed. Tyo left the operating room and with Union representatives and three other nurses, met the CNO.

The CNO claimed that the group was “disrespectful,” their behavior was “unacceptable,” and singled out Tyo as someone who “should know better.” On March 5, 2020, Tyo had a disciplinary meeting and was investigated for abandoning a patient. On March 13th, she was terminated.

After a charge was filed with the NLRB on Tyo’s behalf, the NLRB filed a complaint against the Hospital and the NLRB Administrative Law Judge ultimately found that the Hospital terminated Tyo because of her union activity and the Hospital appealed. The Board applied the *Wright Line* test which requires an initial *prima facie* showing sufficient to support the inferences that protected conduct was a motivating factor in the employer’s decision. This showing requires proof that (1) the employee engaged in protected activity under the National Labor Relations Act (the “Act”); (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer’s action. If that is shown, the employer has the burden to demonstrate the same action would have been taken even in the absence of the protected activity.

Here, the Board majority and Member Ring both agreed that Tyo engaged in union activity and the Hospital was aware of it. Further, the Board found that Tyo's union activity was a motivating factor in her discharge. The Majority found that the CNO expressed disdain for the Union groups' action by saying they were "disrespectful," their actions were "unacceptable" and Tyo "knew better." Very soon thereafter, the Hospital investigated the incident and fired Tyo. In analyzing the CNO's words, the Board noted that the Act's protections for employers, while allowing them to express their views or opinions, expressly excludes statements containing any "threat of reprisal of force or promise of benefit." The CNO here publicly admonished Tyo for her union activity and clearly expressed that her protected activity was impermissible. Conduct that is "unacceptable" by definition is conduct that will not be tolerated. Further, castigating employees engaged in protective activity as being "disrespectful" is not protected under the Act.

While the Hospital argued that it lawfully terminated Tyo because she abandoned a patient in the operating room, the Board Majority found that explanation pretextual. Leaving the operating room with the trainee was not questioned by the surgeon or reported by him. Furthermore, it was common practice for other training nurses to leave trainees to document surgeries and other nurses were not disciplined. Tyo, however, was fired for it. The Board found that patient abandonment was not honestly invoked as a reason but a pretext.

Chairman Ring and the Hospital argued that Tyo lost protections because leaving a patient is "indefensible," i.e., she failed to take precautions to prevent the foreseeable possibility of imminent injury to the patient. Here, her task was to document the surgery. She was not a surgeon, anesthesiologist or scrub nurse. She told her trainee she was stepping out and made sure he was comfortable with documenting on his own and she was reachable by cellphone and the Hospital's messaging device. She was gone briefly when the floating nurse was scheduled to cover her on lunch break. Moreover, the surgeon thought the absence was unremarkable and did not report it. As such, her actions were not "indefensible" according to the Majority. Therefore, the Board awarded Tyo with reinstatement and backpay. This case is another example of the Biden-era Board defending worker rights in a close case.

PRESIDENT BIDEN SIGNS OMNIBUS SPENDING BILL INCLUDING MAJOR CHANGES TO RETIREMENT PLANS

On December 29, 2022, President Biden signed the omnibus spending bill which, most importantly, kept the government from a potentially disastrous New Year's shutdown. The bill also contained significant changes for 401(k) and other retirement plans. The bill, known as SECURE Act 2.0 continues the move, begun by Congress in 2019, to raise the age at which retirees must begin mandatory withdrawals from their retirement accounts, mostly affecting 401(k), 403(b), and SIMPLE IRA plans, to 75.

Other key changes include:

1. Employers can offer emergency savings accounts linked to workers' 401(k) plans;
2. Student loan payments may count as retirement contributions;
3. Low- and middle-income workers' retirement plans can receive a government match; and
4. So-called annual catch-up provision amounts for older workers will increase.

Required minimum contributions ("RMD") are the annual withdrawals from requirement accounts mandated by the Internal Revenue Service ("IRS") once the account owner reaches a specific age. In 2019, the first SECURE Act raised that age to 72. The new bill raises the age to 73 in 2023 and 75 in 2033.

Under the new law, 401(k) and 403(b) plans would automatically enroll participants, with the initial automatic enrollment amount being at least 3% but not more than 10% of wages or salary. Each year, that amount would be increased by 1% until it reaches at least 10%, but not more than 15%. All current 401(k) and 403(b) plans would be grandfathered under the proposal. There is also an exception for small businesses with ten or fewer employees, new businesses that have been operating for less than three years and plans affiliated with religious organizations. The provision is effective for plan years beginning after December 31, 2024.

Employers will also be able to enroll employees in emergency savings plans linked to their 401(k)s. Employees will be able to set aside as much as 3% of their salaries (up to \$2,500) in these accounts. They can make withdrawals without incurring the typical 10% penalty for early withdrawals from retirement accounts and will not have to pay taxes on those funds.

As a further way of addressing the student debt crisis, the law provides that, beginning in 2024, student loan payments will be considered contributions to 401(k), 403(b) and SIMPLE IRA plans, making them eligible for an employer match. In addition, as an incentive to lower- and middle-income workers, the federal government could put up to \$1,000 a year into eligible workers' retirement accounts, starting in 2027. Currently, that tax credit is available to certain workers only if they have tax liability.

Finally, so-called catch-up provisions, higher contribution limits for older workers to make up for lower contributions when they were younger, will have a higher cap. Currently, workers over fifty can contribute an additional \$6,500 each year, which increases to \$7,500 in 2023, with a possible increase to \$10,000 in 2025.

NATIONAL LABOR RELATIONS BOARD CHEERS FUNDING INCREASE

As part of the Omnibus spending bill signed by President Biden on December 23, 2022, the National Labor Relations Board (“NLRB”) received a long awaited and much-needed funding increase. After receiving the same appropriation amount since 2014, Congress raised the NLRB’s funding to \$299.22 million, an increase of \$25 million. The increase comes in the face of a dramatic increase in case filings. In Fiscal Year 2022, case intakes at the NLRB Regional offices rose 23%, the largest numerical increase since 1976 and percentage increase since 1959. Meanwhile, staffing in the Board’s regional offices has dropped 50% since 2002.

While this increase is obviously an improvement, it is a compromise amount which left both Unions and business interests dissatisfied. Indeed, the Administration had requested a 16% increase in funding. Moreover, the increase barely covers the reported \$20 million budget shortfall the NLRB is currently facing. On the other hand, it appears that the increase will help the NLRB avoid layoffs.

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