PITTA LLP
Labor, Employment & Employee Benefits Law Firm

LABOR & EMPLOYMENT ISSUES

IN FOCUS

FOR CLIENTS & FRIENDS

JUNE 13, 2024 EDITION

DISCRIMINATION COMPLAINT AGAINST AMAZON.COM SURVIVES MOTION TO DISMISS

On May 31, 2024, the federal district court for the Southern District of New York rejected Amazon.com's motion to dismiss allegations that it discriminated and retaliated against a Black employee. *See Anderson v. Amazon.com, Inc.*, No. 23-cv-8347 (AS), 2024 BL 188941 (S.D.N.Y. May 31, 2024). Plaintiff Keesha Anderson plausibly alleged that, throughout her over two and a half years working for Amazon Music, she was discriminated against on account of her race in violation of Section 1981, New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL"). Among her allegations were that management excluded her from meetings and events, rejected her ideas, reappropriated part of her budget, failed to support her, limited her tasks, and otherwise deliberately bullied her. She also alleged that the company tried to oust her by offering her the choice of separating from the company or accepting a new, "revamped" position. After she accepted the new position, she was assigned a performance improvement plan setting unrealistic expectations and revoking the offer of the new position.

In order to state an employment-discrimination claim under Section 1981, a plaintiff must plead "(1) that she is a member of a protected class, (2) that she was qualified for the position, and (3) that she suffered an adverse employment action, and (4) can sustain a *minimal* burden of showing facts suggesting an interference of discriminatory motivation." *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015). Anderson alleged, among other things, that Amazon.com subjected her to a hostile work environment and that she was constructively discharged. The Court found none of Amazon.com's behavior to be sufficiently severe or pervasive to sustain a hostile work environment claim; because this claim failed, the constructive discharge theory was rejected as well. However, the Court agreed that a negative performance improvement plan and her diminished role were actions adverse enough to sustain her discrimination claim at the motion to dismiss level. Anderson also met her "minimal burden" to show that the alleged adverse actions were racially motivated; for example, one of her managers told another employee that Anderson was passionate about Hip Hop, although Anderson had never described her music preferences to that manager.

The Court also found that Anderson sufficiently alleged discrimination under both NYSHRL and NYCHRL, the standards for which are much easier for plaintiffs to clear. Under state law, a plaintiff need only show that she was subjected to "inferior terms, conditions or privileges of employment" because of her membership in one or more protected categories. Under city law, she need only show that she was treated differently

or less well due to her employer's discriminatory intent. The Court also found sufficient Anderson's pleading that the performance improvement plan was retaliation for complaining about her treatment. While the Court was "skeptical" of Anderson's reliance on a "whistleblower's" hearsay to establish the causation between her complaints and the adverse employment actions she suffered, at the motion to dismiss stage, the Court must accept these alleged facts as true. Accordingly, the case lives to see another day.

COURT FINDS RESTAURANT CHAIN'S ARBITRATION AGREEMENT IS UNENFORCEABLE FOR SEXUAL HARASSMENT CLAIMS

On June 10, 2024, United States District Judge Robert Kirsch of the District of New Jersey ("Court") held that a restaurant's mandatory arbitration agreement with employees could not be enforced against a transgender plaintiff's sexual harassment claims. The case is *Michael v. Bravo Brio Restaurants LLC*, No. 3:23-cv-03691 (D.N.J. June 10, 2024).

The plaintiff Yanni Michael ("Michael" or "Plaintiff") is a transgender woman who was a server at a restaurant in New Jersey, Bravo Brio ("Restaurant" or "Defendant") for ten months starting in Spring 2022. During that time, her supervisor subjected her to transphobic and homophobic slurs, ordered her to tie her hair up because "you're not a girl," gave her fewer tables saying that she needed to "man up," and told workers not to use the pronouns "they/them." After the Plaintiff reported these issues to a regional manager, human resources investigated. However, Plaintiff was informed that she was suspended because the restaurant believed that she fabricated the claims and accused her of making a bomb threat. After returning from her suspension, she received a disciplinary letter which did not mention the bomb threat or her claims against her supervisor. She alleges the Restaurant's refusal to address her claims resulted in constructive discharge. She brought sexual harassment claims under Title VII and the New Jersey Law Against Discrimination ("NJLAD").

The Restaurant moved to stay the federal court case and compel arbitration under the parties' arbitration agreement. The Court denied the motion. While the Court found that there was a valid arbitration agreement, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") rendered it unenforceable. The EFAA, at the election of plaintiffs, bars the enforcement of arbitration agreements in cases that relate to sexual harassment disputes. To determine whether a plaintiff's claims fall under a "sexual harassment dispute" to trigger EFAA, courts evaluate whether a plaintiff has sufficiently pled a sexual harassment claim.

Here, the Court found that Michael sufficiently pled a hostile work environment sexual harassment claim. Such a claim requires a plaintiff to show: (1) intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would

detrimentally affect a reasonable person of the same sex in that position and (5) *respondeat superior*.

Here, the plaintiff's allegations of the supervisors above behavior satisfied (1). As for element (2), plaintiff alleged at least seven instances of discriminatory conduct during her ten-month tenure satisfied the requirement. Elements (3) and (4) were satisfied by her allegations of severe emotional distress and retaliatory acts such as accusations of bomb threats and suspension. Since her alleged harasser was Plaintiff's superior, *respondeat superior* (5) was established. As such, since Michael sufficiently alleged a hostile work environment claim, EFAA kicked in. The arbitration clause is unenforceable, and the case will stay in federal court.

SIXTH CIRCUIT COURT OF APPEALS RULES AGAINST FUNDS AUDIT WHERE CONTRACT EXPIRED

In what appears to be a simple issue, but actually is not, the United States Circuit court of Appeals for the Sixth Circuit, sitting in Cincinnati, last week held that a group of Operating Engineers Funds were not entitled to audit the books and records of an employer where the employer's collective bargaining agreement ("CBA") expired prior to the beginning of the audit period sought.

Rieth-Riley Construction Co.'s CBA with Operating Engineers' Local 324 expired in 2018, and the parties were unable to negotiate a new agreement. In 2020, the Funds sued for delinquent contributions and an audit. The District Court in Michigan dismissed the case for lack of jurisdiction, finding that without a contract in place, the relevant statutes, the Employee Retirement Income Security Act ("ERISA") and the National Labor Relations Act ("NLRA") did not apply. Without a contract, the District Court held, the matter belonged before the National Labor Relations Board ("NLRB"). The Funds argued that there was language in the Funds' Trust Agreements and in the contribution reports which established a continuing relationship requiring ongoing contributions. The Court rejected this argument, as, according to the Court, this does not show a mutual agreement to be bound.

Thus, the funds cannot force an audit of Rieth-Riley's payroll records from the period after the contract expired, the court said, because the federal statutes that would authorize such an audit require the existence of an active contract requiring fund contributions.

The Sixth Circuit heard the initial appeal in 2022 and reversed, holding that the existence of a live contract between a multiemployer benefit fund and a contributing employer is a question for federal courts to decide on the merits, not a jurisdictional issue that can lead to the dismissal of a lawsuit in favor of NLRB proceedings. Rieth-Riley then appealed to the United States Supreme Court, which refused to hear the case, returning it to the District Court, where Rieth-Riley prevailed on the merits.

The Sixth Circuit affirmed in a decision written by Judge Raymond M. Kethledge and joined by Judge Eric E. Murphy. In addition to holding that the funds couldn't audit payroll records for the time period after the contract expired, the Court concluded that the funds never brought a valid claim seeking to audit records from before that time. This final issue resulted in a partial dissent from Judge Danny J. Boggs noting that the Funds had in fact sought to audit records as far back as January 2017, and their complaint reflected that fact. It should be noted that the Second and Third Circuit Courts of Appeal, covering the New York metropolitan area, take a somewhat more expansive view of this issue, with significant precedent holding that an actual contract is not required to hold an employer liable to a Fund, but rather, conduct by the employer may bind it to a new contract after a prior contract's expiration, as may non-contract documents which reflect an intent to be bound.

The case is *Operating Eng'rs' Local 324 Fringe Benefit Funds v. Rieth-Riley Constr. Co.*, 6th Cir., No. 23-1699, unpublished 6/5/24

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.