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LABOR & EMPLOYMENT ISSUES

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LONG ISLAND HOSPITAL, BELIEVING NURSE WAS A SUPERVISOR, WRONGLY DISCIPLINED HER FOR PRO-UNION ACTIVITY

A hospital in Oceanside, New York violated federal labor law when it denied an employee her desired position as a registered nurse and terminated her because of her interest in joining a union. The National Labor Relations Board ("NLRB" or "Board") agreed with an Administrative Law Judge that South Nassau Communities Hospital ("Hospital") violated the National Labor Relations Act ("NLRA" or "Act") and ordered the Hospital to rehire the former employee with back pay. The case is *South Nassau Communities Hospital*, No. 29-CA-312425, 373 NLRB No. 91 (September 6, 2024).

Charging Party Marylene Teopengco-Merritt was working at the Hospital as a Service Line Coordinator ("SLC") when in October, 2022, the New York State Nurses Association ("Union") began organizing a unit of registered nurses ("RNs"). About a month before the election, Teopengco-Merritt had learned that the Hospital was refusing to consider SLCs as eligible voters. Though SLCs are nurses, the Hospital considered them supervisors and thus ineligible to vote. As a result, Teopengco-Merritt applied for an open position as an RN after being told she would likely have no issues getting the RN job and that she should submit her resignation as an SLC.

When an election was held on January 12, 2023, the Union won by a vote of 370 to 290, with 12 nondeterminative challenged ballots, including Teopengco-Merritt's because of the Hospital's position that SLCs were not eligible to vote due to alleged supervisory status within the meaning of Section 2(11) of the Act. The Hospital then filed objections to the election based on its contention that Teopengco-Merritt was a supervisor who had "fiercely" and illegally supported the union. Shortly thereafter, Hospital managers interrogated Teopengco-Merritt about her union support and affiliation. They told her that because she was allegedly a supervisor, it was her job to represent management's position regarding the Union. The Hospital also told Teopengco-Merritt that the RN position she had applied for had been posted in error, but the Hospital was still accepting her resignation because of her support for the Union, and Teopengco-Merritt was subsequently discharged.

The Union filed a complaint with the Board alleging that the Hospital violated Sections 8(a)(3) and (1) of the Act by denying Teopengco-Merritt the RN position and then subsequently discharging her, and further violated 8(a)(1) by interrogating her and threatening her with discipline if she continued to support the Union. The Hospital did not deny these actions but argued that they were legal because Teopengco-Merritt had been a supervisor. The ALJ disagreed, finding that the Hospital failed to carry its burden to prove that the SLC position duties reflected the indicia of supervisory status including the

authority to "assign" and "responsibly direct" the work of others, the regular exercise of authority using independent judgment, and authority held in the interest of the employer. The Board affirmed, and the Hospital now must rehire Teopengco-Merritt in the position of her choice (SLC or RN) and award back pay.

MICHIGAN FEDERAL COURT BUCKS TREND DENIES EMPLOYER'S ATTEMPT TO ENJOIN THE NLRB

Recently, Judge Laurie J. Michelson of the United States District Court for the Eastern District of Michigan ("Judge Michelson" or "Court") denied a preliminary injunction request by an employer which sought to stop the National Labor Relations Board's ("NLRB") proceedings against it. The NLRB charged YAPP USA Automotive Systems ("YAPP" or "Employer") with committing an unfair labor practice when it fired an employee who organized, in conjunction with the United Autoworkers ("UAW") Local 174 ("Union"), workers at one of its facilities and for interfering with a representation election. YAPP argued it was entitled to a preliminary injunction on two grounds: that the NLRB's structure is unconstitutional and that the Seventh Amendment prohibits the relief the NLRB sought. Both grounds failed. The case is *Yapp USA Automotive Systems Inc. v. National Labor Relations Board et al.*, No. 2:24-cv-12173, (E.D. Mich. Sep. 9, 2024).

Judge Michelson found that YAPP was unlikely to show that the NLRB's structure was unconstitutional. YAPP argued that the NLRB members are unconstitutionally insulated from removal by the President and the NLRB Administrative Law Judges ("ALJs") are also constitutionally protected by multiple levels of for-cause protection. Judge Michelson disagreed. The Supreme Court in 1935 in *Humphrey's Executor* recognized that an exception to the President's removal power permits "Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." Here, the NLRB is a multi-member, independent, expert agency, with Board members balanced along party lines serving staggered multi-year terms, and exercise quasi-legislative and quasi-judicial power. And so, the *Humphrey's Executor* exception still applies to the NLRB, as the Supreme Court has not overruled it. As for the ALJs, they can only be removed for good cause, which is itself "established and determined" by the Merit Systems Protection, Board whose members are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." Judge Michelson found that this protection was constitutional because another exception to the President's removal power is where ALJs perform purely adjudicatory functions.

Likewise, YAPP fell short on the Seventh Amendment right to a jury trial claim. While Judge Michelson questioned whether the Court had jurisdiction to consider a Seventh Amendment Claim, the Court found that the NLRB's request for "make whole" relief falls under the "public-rights" exception to the Seventh Amendment. Under the public-rights exception, unfair labor practice proceedings involve statutory rights "unknown to common law" and are outside the reach of the Seventh Amendment's requirements for a jury trial. Additionally, the NLRB's make-whole remedies are designed to restore the status quo and not designed to punish or deter behavior, and so fall outside the Seventh Amendment.

This win in the Eastern District of Michigan is a notch in the NLRB's belt after two losses in Texas federal courts in similar cases brought by SpaceX and Energy Transfer LP.

LARGE EMPLOYERS ARE TOPS AT VIOLATING NYC PAID SICK LEAVE ACT

Ten years ago, when New York City established mandatory paid sick leave for employers with more than five employees, no one expected that the biggest violators would have been major employers like Starbucks and Shake Shack. Alas, that is what the data shows.

Since the beginning of 2023, they are among the employers fined by the city for failing to offer at least five paid sick days annually. The City's Department of Consumer and Worker Protection issued 105 sick leave violations in 2023, with fines totaling $1.2 million. In 2024, $432,449 in fines have been issued for 49 violations.

Under the law, the first violation brings a $500 fine, with $750 for a second, and $1,000 for subsequent violations. In 2024 so far, Amazon was fined $85,953 for its violations, White Castle $64,134, and Panda Express $300,000. Amazon paid $136,000 in restitution to 273 workers, according to DCWP. The web megastore failed to provide some part-time and short-term workers with accrued sick leave at its Woodside, Queens DBKI location.

According to Councilmember Gail Brewer (D-Manhattan) the Earned Sick Leave Act, signed into law by former Mayor Bill de Blasio in 2014, has been a resounding success. "Passing the law took four years of non-stop advocacy and coalition building," Brewer said, noting she first introduced the legislation in 2009.

Meanwhile, former Mayor Michael Bloomberg and City Council Speaker Christine Quinn had blocked the law for four years, arguing that it would unfairly burden small businesses during a time when the economy was already in a tailspin after 2008's global financial collapse. When Quinn finally allowed the legislation to move forward in 2013, Bloomberg vetoed it shortly afterwards. The Council overrode the veto.

When Mayor de Blasio took office in January 2014, he backed an expanded version of the law to include manufacturing workers, who were previously exempted. The new law also applied to all businesses with five or more employees. The previous legislation only applied to businesses with 15 or more staffers.

After initially opposing the law, the sick leave laws have now been broadly accepted. The City largely bases its probes on employee complaints. Indeed, the Starbucks cases were triggered by staffers at cafes on 7th Avenue in Park Slope and inside the Staten Island Ferry Terminal, according to the worker protection agency. Those investigations resulted in $7,200 in back pay for the two workers — $4,500 and $2,700.

Under a separate city law passed in 2017, companies must also give their staff schedules at least two weeks in advance or pay some type of bonus.

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