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FEDERAL LABOR BOARD WINS INJUNCTION IN MICHIGAN AND SURVIVES ATTACK ON CONSTITUTIONALITY

A judge in the United States District Court in the Western District of Michigan agreed that a hospital must recognize and bargain with the union representing its employees while, in a separate opinion, rejecting the hospital's constitutional attack on the National Labor Relations Board ("NLRB" or "Board"). The case is *Kerwin v. Trinity Health Grand Haven Hospital*, Docket No. 1:24-cv-00445 (W.D. Mich. Apr 30, 2024).

Trinity Health ("Hospital"), a national health system that operates hospitals, acquired North Ottawa Community Hospital in Grand Haven, Michigan in October 2022. Prior to the acquisition, certain employees at the hospital were represented by the North Ottawa Community Hospital Employees Association. In November 2022, members of that union voted to affiliate with the Service Employees Internation Union Healthcare Michigan ("SEIU" or "Union"). In August, 2023, after certain employees gathered enough signatures to file a decertification petition, the parties agreed to hold a decertification election. However, after polls closed, and before the votes were tallied, the Hospital received a "disaffection petition" from the employees who were trying to decertify the union; this petition was seven pages and filled with signatures. Upon review of the document, the Hospital decided that the signatures represented more than a majority of the employees in the unit and withdrew recognition of SEIU. When the votes of the decertification election were counted, the Union had prevailed. The Hospital requested review, which the Board denied "based on well-established precedent holding that an alleged postelection loss of majority support is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election." SEIU then filed charges with the Board alleging that the Hospital was engaging in unfair labor practices by refusing to bargain. The administrative law judge ordered the Hospital to cease and desist from refusing to bargain in good faith with the Union. While the case is pending before the Board, the Board sought a 10(j) injunction to preserve the status quo until it cand issue an ultimate decision in the matter.

Section 10(j) of the National Labor Relations Act ("NLRA" or "Act") empowers the Board to seek preliminary injunctions in federal district courts to quickly remedy unfair labor practices. In June 2024, the Supreme Court of the United States raised the standard for district courts to issue 10(j) injunctions (see *Starbucks v. McKinney*, 144 S. Ct. 1570 (2024) ("*McKinney*")), and the Michigan court received additional briefing on the 10(j) issue in light of the decision. Under *McKinney*, in order to obtain an injunction, the Board

has to show (1) a likelihood of success on the merits; (2) irreparable harm; (3) that the balance of equities tips in favor of injunction; and (4) that injunction is in the public interest. Before *McKinney*, the Board merely had to show that (1) there was reasonable cause to believe an unfair labor practice had occurred and (2) relief would be "just and proper." While the ultimate impact the change to the 10(j) standard remains to be seen, the decision in Michigan—by a George W. Bush-appointed judge—could signal positive outcomes for the Board in 10(j) proceedings, *McKinney* notwithstanding (at least outside of the Fifth Circuit).

While Trinity also sought judgment on the pleadings, claiming that the underlying unfair labor practice proceedings were unconstitutional because NLRB members and administrative law judges are unconstitutionally protected from being fired (borrowing arguments from employers like SpaceX, Amazon, and Starbucks), the Court rejected this argument, finding that the Hospital failed to carry its burden to demonstrate that the Board's process for considering unfair labor practice complaints violates the Constitution.

FIFTH CIRCUIT LETS MUSK'S TWEET FLY

On October 25, 2024, an en banc United States Court of Appeals for the Fifth Circuit ("Fifth Circuit" or "Court") overturned a National Labor Relations Board ("NLRB" or "Board") decision, which ordered Tesla CEO Elon Musk to delete a tweet sent during an organization drive by the United Auto Workers ("UAW"). The case is *Tesla v. N.L.R.B. et al*, No. 21-60285 (5th Cir. Oct. 25, 2024).

On May 20, 2018, during UAW's organizational drive at a Tesla plant in California, Musk posted on Twitter (since then bought by Musk and renamed "X") that: "Nothing stopping Tesla team at our car plant form voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare." The UAW filed an unfair labor practice charge with the Board which found the tweet an unlawful threat and ordered it deleted. A Fifth Circuit panel affirmed the Board's order and Tesla petitioned for en banc review.

The en banc Court Plurality vacated the Board's order. The Court found that the Board's order to delete the tweet was in error and "[t]hat alone is enough to vacate its order . . . ." According to the Court, "deleting the speech of private citizens on topics of public concern is not a remedy traditionally countenanced by American law." The Court held that the tweets are constitutionally protected speech and do not fall into exceptions for unprotected speech such as obscenity and perjury.

The Court also remanded to the Board its decision to reinstate a worker involved in the organizing drive with backpay because the "neutral decision maker" who decided to terminate the worker had pro-union sentiments, and had no anti-union animus.

The dissenting opinion by Judge Hanes Debus criticized the Court's "short opinion that is light on law and facts." The Dissent pointed out that the plurality opinion did not mention whether the Board was able to enforce the seven uncontested unfair labor practice violations against Tesla. Further the Plurality's Opinion was "inconsistent with established First Amendment principles and with this court's role as a court of review." As for reinstatement of the worker, the Dissent pointed out that the neutrality of the decision maker does not "wash away the substantial evidence of anti-union animus" by Tesla.

CFPB TAKES A STAND AGAINST UNCHECKED WORKER SURVEILLANCE

On October 24, 2024, the Consumer Financial Protection Bureau ("CFPB") issued groundbreaking guidance (available here) ("Guidance") to address the escalating concerns around unchecked digital tracking and opaque decision-making systems in workplaces. With this move, the CFPB aims to bring traditional Fair Credit Reporting Act ("FCRA") protections into the modern era of workplace surveillance and algorithmic decision-making.

The digital age has brought with it innovative ways to monitor and evaluate workers. Companies have increasingly turned to sophisticated surveillance tools that track everything from performance metrics to biometric data. This has included the use of "black box" scores—a form of assessment that uses algorithms to evaluate workers in ways that are often opaque and unaccountable. Until now, these practices have largely escaped the rigorous oversight applied to other areas of consumer protection. Currently, companies have been using this data to predict worker behavior (such as assessing the likelihood of employee union organizing drives), reassigning workers (such as automated systems using worker performance to determine future availability and historical patterns to reassign team members), and social media activity (such as analyzing workers' social media presence for discipline).

The Guidance clarifies that the FCRA's stringent standards for accuracy, dispute resolution, and transparency apply to employment-related reports as much as they do to traditional credit reports. This is a significant development for several reasons:

1. **Consent and Transparency:** The guidance requires employers to obtain explicit consent from workers before collecting or purchasing reports that could impact employment decisions. This means that workers must be fully aware of and agree to the data collection processes that affect them.

2. **Right to Dispute:** Similar to credit reports, workers now have the right to access the data collected about them and to dispute any inaccuracies. This is crucial in ensuring that decisions based on faulty data can be challenged and corrected.

3. **Limits on Use:** The CFPB has made it clear that the use of these reports by employers is strictly limited to purposes that are legally permissible. Employers cannot, for instance, sell personal worker data or use it to unfairly discriminate.

Additionally, the collaboration between the CFPB and the National Labor Relations Board ("NLRB") further strengthens worker protections against practices that could chill protected concerted activities. This partnership aims to address practices like invasive surveillance that might deter workers from engaging in union organizing or other collective activities protected under the National Labor Relations Act. Furthermore, the joint efforts of the CFPB and NLRB highlight a holistic approach to protecting employees not just as workers but as consumers of financial and technological products within the workplace. The guidance comes at a critical time when worker surveillance tools could potentially be used to undermine labor rights. For instance, predicting worker behavior related to union activities or using data analytics to influence management decisions without transparency can now be contested more robustly under the FCRA.

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