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LABOR & EMPLOYMENT ISSUES

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FOR CLIENTS & FRIENDS DECEMBER 5, 2024 EDITION

FEDERAL LABOR BOARD'S TOP ATTORNEY ISSUES MEMO EMPHASIZING IMPORTANCE OF REJECTING SETTLEMENT AGREEMENTS THAT VIOLATE LAW

On November 26, 2024, the National Labor Relations Board's ("NLRB" or "Board") General Counsel, Jennifer Abruzzo ("GC Abruzzo"), published a Memorandum ("Memo") encouraging Regional Board personnel to "vigorously object to" settlement agreements proposed by respondents in unfair labor practice cases which fail to address the "public rights implicated by the underlying unfair labor practice allegations." The Memo, which may be read in its entirety here, reemphasizes that settlement agreements that protect the private rights of parties involved in any particular charge at the expense of public labor rights are contrary to federal labor law and must be rejected.

The Memo serves as a follow-up to an August Board decision, *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras*, 373 NLRB No. 89, slip op. at 1 (Aug. 22, 2024), in which the Board announced that it would end its practice of accepting "consent orders" based on terms proposed by respondents, agreed to by administrative law judges, and objected to by the charging party and the General Counsel. With consent orders discontinued, combined with the Board's commitment to seeking full remedies in settlement agreements, GC Abruzzo issued the Memo in anticipation of consequential increased efforts by employers to settle directly with charging parties.

The Memo cites a doctrine established in a case called *Independent Stave Co.*, 287 NLRB 740 (1987). In that case, the Board clarified that, although the Board should be open to settlement of controversies between parties, the Board should not give effect to settlements which contradict the Board's function, which "is to be performed in the public interest and not in the vindication of private rights." Thus, under *Independent Stave*, the Board should consider the following when evaluating settlement agreements: "(1) which parties have agreed to the settlement, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement 'is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation'; (3) whether the settlement itself has been induced by fraud or coercion; and (4) the respondent's history of violations of the [National Labor Relations Act] or breach of prior settlement agreements." These elements are intended to favor settlements that serve the public interest; the Memo reemphasizes the importance of insisting that settlement agreements address not only the discrete unfair labor practice at issue as it relates to named parties, but also the "financial and chilling effects of unfair labor practices

on unnamed individuals, including non-charging party discriminates and a respondent's workforce as a whole."

Accordingly, the Memo encourages administrative law judges and Regions to reject unreasonable agreements that fail to adequately address the public rights at issue.

THE SECOND CIRCUIT SPEAKS ON SEX AND COVID

A recent decision of the U.S. Court of Appeals for the Second Circuit emphasizes several plaintiff-friendly rules for district courts to apply in discrimination cases, here in the unlikely intersection of sex and COVID-19. *Back v. Bank Hapoalim*, 2d Cir. No. 24-01064 (Nov. 11, 2024).

Sol Back worked closely with the Bank's CEO Gil Karni as his executive assistant, alleging she served as "a kind of Chief of Staff to the CEO." During the COVID-19 pandemic, Karni came to work knowing he was infected. COVID-19 then broke out at the Bank, sickening staff including several senior executives and department heads, including Back. Many of the male senior executives complained about Karni's conduct, but only Back filed a formal whistleblower complaint as prescribed in the Bank's rules. Soon after, Karni started expressing displeasure with Back's work and she was shuttled to two inferior positions away from Karni where she had no experience. Back quit, and sued the Bank and Karni alleging constructive discharge and sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and the New York State and City Human Rights Laws.

The District Court dismissed the case on the grounds that Back alleged insufficient adverse employment action and no valid comparators. A panel of Circuit Judges Carney, Sack and Bianco reversed and remanded the case to the District Court, stressing the lenient plausibility standard in evaluating a discrimination complaint on a motion to dismiss.

First, the Court of Appeals cited a recent U.S. Supreme Court decision holding that allegations of adverse employment action do "not have to show ... that the harm incurred was significant [ ], [o]r serious, or substantial, or any similar adjective suggesting ... a heightened bar," but only "*some* harm." *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024). Applying this standard, Back's allegations of "transfer away from the center of power," perceived as a demotion, sufficed.

Second, the Second Circuit found that Back had pled sufficient facts to send her constructive discharge claim to a jury. In assessing "constructive discharge," the Court asks whether "a reasonable person subjected to the same conditions as the plaintiff would have felt compelled to step down," either because of a single incident or "the cumulative [e]ffect of a number of adverse conditions ..." Here, Back alleged that Karni became "noticeably hostile" to her after her internal Complaint, and that she had to choose between a demotion to a lower position or resignation. "Construing those allegations cumulatively and most favorably to Back," one could reasonably infer that a reasonable employee would be compelled to resign.

Finally, the Court held that a jury could reasonably conclude that the adverse employment action suffered by Back justified her resignation and raised a "minimal inference of discriminatory motivation" by treating her less favorably than similarly situated employees of the opposite sex. Back alleged that five male executives also complained of Karni's COVID-19 conduct but were not disciplined. In the Appeals Court's opinion, the District Court erred in determining that these male senior executives were not apt comparators for female administrative assistant Back and that her formal complaint was "simply too different in kind" from the men's verbal criticisms. Moreover, Back's allegations that Karni would scratch his crotch when near her and insist that she serve and clean up his lunch "provide a contextual basis for inferring [sex] discrimination." Ultimately, concluded the Second Circuit, these questions "are not appropriately resolved ... as a matter of law, on a motion to dismiss."

The Second Circuit's decision in *Back* clearly signals that district courts should read discrimination complaints with an eye favoring factual support for the legal theories allegedly pled, denying motions to dismiss when in doubt. While a welcome Thanksgiving gift to plaintiffs and their counsel, employers and their attorneys may increasingly find *Back* difficult to digest.

NEITHER INTERROGATION, NOR COERCION, NOR THREATS, NOR CONSTRUCTIVE DISCHARGE STAYS THESE COURIERS FROM THEIR PROTECTED UNION RIGHTS

On November 27, 2024, the National Labor Relations Board ("Board" or "NLRB") adopted an Administrative Law Judge's ("ALJ") decision which found the United States Postal Service ("Postal Service" or "USPS") violated the National Labor Relations Act ("Act" or "NLRA"). The case is *United States Postal Service*, 373 NLRB No. 138 (2024).

The case stems from May 2021 when a letter carrier, Nicolas Montross ("Montross"), a member of Branch 84, National Association of Letter carriers, AFL-CIO ("Union") refused to work more than 60 hours in one week. Montross, who in May 2021 was regularly working 60-hour weeks, was exhausted when he learned that he was scheduled to work on his day off. He found an article from a Union newsletter explaining the 12/60 Rule. The 12/60 Rule, which was found in the Union and Postal Service's contract and memorandum of understanding, as well as an arbitrator's award, states that workers are prohibited form working more than 12 hours in a single work week or 60 hours within a week, with the one exception being the month of December.

On May 14, 2021, Montross hit 60 hours during his shift, returned letters to the Postal Services' Greenburg, PA facility and he invoked the 12/60 Rule. On his return on May 17th, he shook hands with his shop steward on the workroom floor. Both were later interrogated by management. Management threatened Montross with arrest for delaying the mail, stated that he was not loyal to the Postal Service and tried to find out where he learned about the 12/60 Rule. The shop steward was likewise interrogated, his loyalty questioned, and management wanted to know if he told Montross about the 12/60 Rule.

Montross did not return to work. The Postal Service sent him two resignation forms, and fearing arrest, he signed the second one he received.

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The ALJ found that invoking the 12/60 Rule was protected activity under the Act because "an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected concerted activity." While the Postal Service can lawfully investigate, it was clear that management had made up their minds before interrogating Montross and threatened him with criminal prosecution, discipline and termination in response to him invoking the 12/60 Rule. Similarly, the shop steward was interrogated unlawfully only because he was seen shaking Montross's hand and management wanted to know how Montross found out about the 12/60 Rule. Additionally, the ALJ found that management's implications that Montross and the shop steward were disloyal for invoking the 12/60 Rule also violated the Act.

As such, the ALJ found that the interrogations and threats violated the Act and ordered Montross, who was found to be constructively discharged reinstated with a backpay, and ordered the Postal Service to make him whole for "any direct and foreseeable pecuniary harms" incurred as a result of his discharge under *Thryv, Inc.*, 372 NLRB No. 22 (2022).

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