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Labor & Employment Law Department

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Reinstatement of Serial Sexual Harasser Violates Public Policy

Sexual harassment remains a significant problem in some workplaces, and most employers understand the need to take prompt and effective action to stop it. In a union setting, however, an employer may need to defend its action before an arbitrator, and since "just cause" for discipline is often in the eye of the beholder, the outcome may be less than certain.

That's what the Connecticut Department of Corrections found after they fired an employee who engaged in a pattern of egregious, offensive harassment of women in the workplace. The union representing Corrections Officers pursued a grievance through the various steps to arbitration before the late Tom Staley. He found that while the employee had committed the offenses of which he was accused, discharge was too severe a penalty, and he ordered the grievant reinstated after a year's suspension without pay or benefits.

The DOC went to court and argued that reinstatement of an incorrigible sexual harasser violates the clear, well-defined and dominant public policy against sexual harassment. The trial court agreed, as did the Appellate Court, and recently the Connecticut Supreme Court affirmed those decisions.

Interestingly, the Court saw the case as presenting a conflict between two public policies, the one favoring arbitration and the one opposing sexual harassment. That tension becomes apparent when comparing the opinion of the Supreme Court majority, which focuses on the latter, with the opinion of the one dissenting justice, which emphasizes the former.

The majority said that while courts normally defer to arbitrators when they are acting within the scope of their authority, such deference is not warranted when the award is in conflict with a clear and strong public policy. The dissenter thought it wasn't necessary to fire the harasser in order to vindicate that public policy.

Obviously, these judgments are rarely black and white, and the outcome may depend upon who is making the decision. For example, just a few days ago a Superior Court judge refused to set aside an arbitration award reinstating a Bridgeport

school custodian who was terminated for making threatening statements. The employee made several profane complaints about alleged mistreatment at the hands of his supervisor, and sent him various articles about the Columbine school shootings with a prediction that similar events could occur in Bridgeport. The arbitrators at least conditioned reinstatement on the custodian's participation in an employee assistance program and passing a psychological fitness for duty exam.

Our opinion is that cases like these tend to make discipline decisions too much of a crapshoot. Employers are under pressure to rid the workplace of dangerous or offensive workers, but in a setting where arbitration of discipline disputes is available, there is often not enough certainty about the outcome. Even if the employer prevails, the process is expensive and time-consuming, and a loss can result in substantial back pay liability, not to mention the potential negative impact on employee morale and other workplace issues. There must be a better way to make the outcome of disputes over discipline more predictable, though admittedly nobody seems to have found one yet.

Recent S&G Website Publications

Employers Given Until November 5 to Create E-Verify Cases for Employees Hired During Government Shutdown
Published October 22, 2013

Dress Codes And Personal Appearance Standards
Published October 21, 2013

Retaliation Claims are Common, But Not Easy to Prove

We have written before about the prevalence of retaliation claims, and the fact that employees often fail to succeed in a discrimination or other work-related complaint, only to bring a later claim that some adverse action by their employer was taken to get back at them for filing their original (albeit groundless) complaint. Bringing a retaliation claim is easy, but winning it is an entirely different thing.

A few weeks ago an AT&T employee had a retaliation lawsuit dismissed by a federal court because the judge said no reasonable jury could return a verdict for the plaintiff. Previously, the employee had filed a sex discrimination complaint with the CHRO after being accused of sexual harassment. Six months later, he was fired for insubordination and because he had submitted a report stating that he had completed certain work when in fact he had not done so. In addressing his complaint that the discharge was retaliatory, the court found that the plaintiff had the lowest preventive maintenance statistics in his department, failed to follow purchasing protocols, and co-workers complained about him.

Similarly, a nurse who suffered from multiple sclerosis was unsuccessful in proving that a hospital's change in her assignment was implemented in retaliation for her refusal to support her employer's nomination as "MS Employer of the Year." The hospital demonstrated that the change in assignment was justified as a result of a legitimate business decision to revamp admission policies, and the nurse was unable to show that such justification was a pretext for retaliation.

Both these claims were dismissed early in the litigation process, but that is not always the case. A special education teacher in Norwalk avoided summary judgment when she sued for retaliation after she was informed her contract would not be renewed. She had developed asthma and engaged in a running battle with the school administration over alleged failure to accommodate her health needs. Although the school district argued the non-renewal was not retaliatory, it didn't help that the action was taken only a few months after the teacher filed a CHRO complaint.

Incidentally, retaliation claims can result from any adverse personnel action, not just termination of employment, as in the three cases discussed above. In fact, at least one recent Superior Court decision holds that even the threat of an adverse employment action (in that case a poor evaluation that could lead to dismissal) is sufficient grounds for a lawsuit.

Our advice to employers is that when considering discipline, discharge, or any other adverse

action against an employee, in addition to assessing risk factors such as age, gender, ethnicity etc., they should also check to see whether the employee has recently engaged in some protected conduct, such as filing a lawsuit or administrative complaint, making an internal complaint about perceived mistreatment, or even talking with co-workers about workplace gripes. It's unfortunate, but the smart business decision may be to hold off on the proposed action, unless the case against the employee is clear and compelling.

Who Gets Jobless Benefits?

You could be surprised. As we have reported before, decisions about who is eligible for unemployment compensation benefits in Connecticut are not always predictable, and not always consistent. Some examples over the last few months are instructive.

You might think that a truck driver who loses his license because an off-duty DUI offense, and therefore can't drive trucks, would be ineligible for jobless benefits. If so, you'd be mistaken, according to the Connecticut Supreme Court. The justices said that a statutory provision denying benefits to commercial truck drivers who lose their license "as a result of a drug or alcohol testing program mandated by and conducted in accordance with federal law" does not apply to loss of license due to an off-duty DUI offense, and awarded the driver benefits.

But wait, what if he wasn't a commercial truck driver? Apparently the rules are different for the rest of us. If an employee can't get to work because his personal vehicle breaks down, or even is stolen, he is not eligible for benefits. Presumably the same result applies if he loses his license. (Note there is an exception if an employee loses access to transportation other than his personal vehicle; benefits have been granted where a bus route no longer goes through the employee's neighborhood, and in one case where a neighbor stopped loaning the employee her car.)

Other unemployment compensation cases turn on similarly fine distinctions. A security specialist at ESPN was fired for repeatedly accessing adult web sites while at work. He was denied jobless benefits at the administrative level, and that outcome was affirmed in court, because the employee had engaged in "willful misconduct." However, the judge's opinion seemed to rest on the fact that ESPN had a policy prohibiting such conduct. What if the policy had also prohibited online shopping or other personal internet use during work time? Would occasional violations of such a policy also constitute willful misconduct?

One other example: A patient care worker at Bristol Hospital was fired after several warnings about insubordination and disrespectful conduct in the workplace. The last straw was an incident where the employee continued to argue loudly in a patient care area despite repeated requests to speak quietly and come into her supervisor's office. Clearly this employee deserved to be fired, but just how disruptive or insubordinate does someone have to be before it constitutes willful misconduct?

Our opinion is that when it comes to jobless benefits, no system is perfect, and many decisions have an unavoidable element of subjectivity. All we can hope for is that most unemployment compensation administrators get it right most of the time, and that if

an employer cares enough to challenge the outcome, a fair and unbiased review will be conducted.

Now We've Seen Everything. . .

It used to be that we used that heading only once in a great while. Lately, however, it seems that wacky stories are becoming more and more common, as creative employees and their even more creative lawyers take positions that leave us shaking our head. Here's the latest one:

"A putative class of California brewery workers hit Anheuser-Busch on Friday with a suit accusing the company of denying them proper overtime wages, alleging that payment in free beer and other perks were unfairly excluded in pay-rate calculations, lowering the overtime payment."

Say what? It seems a disgruntled ex-employee of the giant beverage producer has brought suit alleging various wage and hour violations, and seeks to represent a class of hourly paid workers at the employer's brewery in Van Nuys, California. The group consists of those whose overtime wages were allegedly understated because the value of various incentives and perks, including free beer, was not added to their base rates before figuring their time and one-half rates for hours over 40 in a week, or their double time rates for hours over 12 in a day.

Our opinion is that it would be a stretch for a court, even one in California, to conclude that non-monetary perks such as free drinks constitute wages. What's next, placing a value on access to the company water cooler?

Legal Briefs *and footnotes*

Discharge for D-SNAP Fraud: A state employee who misrepresented her income and failed to report the income of others in her household when applying for D-SNAP benefits after losing power in Storm Irene was fired, but her union took her case to arbitration. An arbitrator upheld the discharge, but the union went to court arguing that other employees who committed similar offenses had their terminations reduced to suspensions by other arbitrators. The judge ruled that arbitrators are not bound to follow the decisions of other arbitrators, even when the same parties and the same issues are involved, and refused to set aside the award.

Female DOC Applicants Settle: In 2011, we reported on a lawsuit by female applicants for correction officer positions who were not hired because they couldn't meet the time requirements for a 1.5 mile run. The trial judge ruled that Department of Corrections hadn't proven that a specific time for the run was essential to the job, since the time requirements were different for males and females. Now the case has been settled, with the DOC agreeing to pay the women and their attorneys $3,000,000.

Cop Skips Drug Test: A Bridgeport police officer was asked to take a random drug test in accordance with a policy agreed to by his union. He immediately claimed sickness and went to the hospital, where he was diagnosed with dehydration. Nevertheless, he was suspended for 30 days. The majority of a panel of arbitrators found no provision in the agreed policy that excused officers from testing due to illness. They concluded that the officer had effectively refused to be tested, and upheld the suspension.

S&G Notes: More than 100 clients and friends attended our annual fall labor and employment seminar on October 25. Materials are available electronically for those who could not attend.

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