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Labor & Employment Practice Group

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Will Smoking Pot on the Job Get You Fired?

You'd think that would be a slam dunk question, but if you're a state employee whose union is willing to take your case to an arbitrator, apparently it isn't.

Back in 2012, a UConn Health Center employee was found smoking pot in a state vehicle during working hours. His job involved operating power equipment and driving large trucks. Consistent with UConn's drug-free workplace policy, he was fired. However, his union pursued a grievance on his behalf, and argued that he had a clean work record, was not criminally prosecuted for the drug offense, and only smoked pot to help him deal with various "personal issues."

The case went before an experienced arbitrator, Jeffrey Selchick, who ruled that while UConn's policy allowed discharge for a first offense, it did not require it. He said the Health Center had grounds to impose a "substantial penalty," but not discharge. He ordered the firing changed to a six month suspension without pay. The state took the matter to court, arguing that the employee's conduct endangered co-workers and the public, and that the decision sent a message to state employees and taxpayers that drug use on the job is acceptable.

A Superior Court judge agreed, and found that the arbitrator's decision was contrary to

the public policy of the State of Connecticut. This time the union appealed, and the matter was recently argued before the Connecticut Supreme Court, which will likely rule in the next few months.

The case has received attention in the press, and is of interest to lawyers because it involves what amounts to a clash between two well-established policies. One is the principle that courts generally should not substitute their judgment for the decisions of arbitrators. After all, the parties have agreed to arbitration instead of litigation as a means of resolving disputes, and if judges were willing to second-guess arbitrators, the courts would be swamped with additional cases.

On the other hand, there's the principle that arbitration awards should not violate firmly established public policy. For example, a child molester shouldn't be in an elementary school teaching position. That was presumably the logic behind UConn's decision, since drug use is illegal as well as dangerous, especially if the user operates heavy equipment. However, the union has argued to the Supreme Court that smoking pot on the job shouldn't require automatic dismissal, especially if the employee has an otherwise good record and is not likely to be a repeat offender.

Our opinion is that certain offenses should call for automatic dismissal, and that drug or alcohol use on the job should be high on that list. There are many hard-working, law-abiding people who are unemployed or under-employed, and would love to have a good job with generous state employee benefits. They are more deserving than the pot-smoker at the center of this case. But let's see what the Supreme Court says.

Timing is Important But it Isn't Everything

We often advise clients that taking an adverse action against an employee is always riskier if it follows soon after the employee has engaged in a protected activity. Examples include filing a workers comp claim, exercising FMLA rights, alleging discrimination, whistleblowing, engaging in free speech, or supporting other employees who have participated in such activities. Bad timing was involved in a recent court decision involving a surgeon who moved to Connecticut after what he understood to be a job offer from a hospital. However, in an interview with hospital

management, the surgeon disclosed that he had decided to transition to a woman. Thereafter, other applicants were given positions at the hospital but the transgender surgeon was not. He (now she) brought suit in federal court.

Presumably understanding that the timing made the claim difficult to defend, the hospital argued that Title VII of the Civil Rights Act, which prohibits discrimination based on sex, does not cover transgender status. They claimed Title VII protects a woman from discrimination because she's a woman, but not because she decides to become a man. The judge gave that argument short shrift, noting that dictionary definitions of "sex" have for centuries included any property by which "any animal is male or female." He saw those definitions as sufficiently broad to include gender identity or expression.

Not surprisingly, he went on to reject the hospital's claim that the surgeon had not proven causation, finding that a reasonable jury could conclude that the hospital's stated excuses for not hiring her constituted a pretext. Therefore, unless it is settled, the case is headed for trial.

This doesn't mean an employee is insulated from adverse action for some period of time after engaging in a protected activity. Take for example the Sysco Connecticut employee who was fired shortly after filing a workers comp claim, in which she said she'd been working too hard and injured her leg. While investigating the claim, the employer found video of the

worker carrying boxes of food products out of the warehouse and putting them in her car, seemingly without difficulty.

On the day after she returned from workers comp leave, her supervisor confronted her as she carried a case of hamburger to her car, and she was fired. Presumably relying on the timing issue, her lawyer filed a lawsuit, but the judge dismissed it. He found the employee's "hamburglary" provided adequate grounds for the discharge, and ruled for Sysco.

Our advice to employers is always to look for potential grounds for a discrimination or retaliation claim before disciplining or discharging an employee. In particular, identifying recent protected activity is critical. However, finding such issues doesn't end the inquiry. If the evidence of misconduct is clear enough and the justification for discipline is strong enough, the action will likely be upheld if challenged.

Free Speech Cases Must Balance Interests

Lawsuits alleging violation of an employee's free speech rights are complicated. For one thing, both the U.S. Constitution and the Connecticut Constitution contain free speech protections. There's also a Connecticut statute on the subject, and last year our Supreme Court held that it required a different analysis than that which applies to constitutional issues.

Then there are the various steps involved in the analysis of free speech claims brought by

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public employees. One, does the speech involve a personal grievance or a matter of public interest or concern? Two, was the employee speaking only in his capacity as a citizen, or did he make the statements in the course of carrying out his duties (which deprives the speech of protection, at least under the U.S. Constitution)? Three, does the government's interest in maintaining proper performance of its functions outweigh the public's interest in disclosure of impropriety?

That last point was critical in a recent federal court case involving a UConn administrator who complained about unethical activity and nepotism when a dean appointed his own wife to head up a program. The employee was not reappointed to his position when it came up for renewal, and he claimed that was in retaliation for his exercise of free speech rights.

A federal judge found that the employee's statements involved not just a personal grievance but a matter of public concern,

since the dean's appointment of his wife did not directly affect the employee, and other cases have held that cronyism and nepotism in government are legitimate subjects of public interest. Also, since the appointment of the dean's wife did not fall within the employee's area of responsibility, he was speaking as a citizen, not an employee.

However, balancing the interests of the public and the government, the judge found that the allegation of nepotism was limited to a single instance involving a small number of individuals, while its potential to undermine the dean's authority and his ability to carry out his work was significant. Regarding this latter point, the judge said the fact that the plaintiff was a high level manager and not just a rank and file employee was important.

Our advice is to consult with counsel before taking action against an employee that could be attributed to statements or conduct to which the "free speech" label could apply. The law in this area is complex, and still evolving. Even the UConn case discussed above

is not over, since the federal judge has sent the case back to state court for analysis of the state law claims, which could produce a different result.

No Good Deed Goes Unpunished

The Oxford Board of Education has learned the hard way that if you allow a group of unionized employees to enjoy a benefit over time, it may be hard to do away with it, even if the benefit is not mentioned in the applicable collective bargaining agreement.

A teacher in Oxford ran out of contractual sick leave and asked to be provided with a "sick leave bank" consisting of sick time donated by fellow union members. Similar arrangements had been approved before, on eight occasions over the previous ten years. However, the Superintendent denied the request because there was no such provision in the collective bargaining agreement, and there were no standards by which he could assess eligibility, duration, or other elements of the requested leave.

The teacher's union went to the State Board of Labor Relations, which ruled that Oxford had committed a prohibited practice by unilaterally changing a condition of employment. The Board said the sick leave bank was an established "past practice" because it was "clearly enunciated and consistent, it endured over a reasonable length of time, and was an accepted practice by both parties." Although Oxford claimed the administration was free to accept or reject requests on behalf of individual



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teachers, apparently it could not point to any examples where use of a sick leave bank was requested but denied by the administration.

The school district went to court in an attempt to overturn the SBLR decision, but a Superior Court judge recently refused to do so. He started his analysis by reciting the established legal principle that decisions of administrative agencies responsible for interpreting and applying laws in a given subject area are entitled to considerable judicial deference. He went on to conclude that the SBLR's determinations were not unreasonable, and were within the scope of its discretion. In particular, he dismissed the argument that the sick leave bank practice was not consistent because many teachers took unpaid leave without requesting a bank. He thought it was more important that all the requests made in the preceding ten years had been granted.

Our opinion is that cases like this highlight the same issue that has led to criticism of the National Labor Relations Board by private sector employers. Decisions of labor agencies that could be perceived as union-friendly are given deference by the courts, and thus employers are disadvantaged. The SBLR doesn't have any management advocates among its members.

Legal Briefs and Footnotes

No Double-Dipping Under MERS: The law clearly states that an employee who has worked for a municipality that participates in the Municipal Employees Retirement System cannot go to work for a second participating municipality and still collect a pension based on his work for the first. One municipal employee tried to do just that, and claimed it was justified because his position with the second

municipality was not covered by MERS. A court has ruled that the law means what it says; one can't collect a MERS pension while working for a participating municipality, regardless of the position held.

Double Damages for OT Violations: A Westport nail salon and its owner were both hit with double damages totaling over \$40,000 for falsifying time records, requiring two employees to work "off the clock," and threatening to fire them if they didn't pay back amounts received as a result of an earlier Department of Labor investigation. The judge said that the owner knew what the rules were as a result of the earlier investigation, but instead of "getting the message" she attempted to evade the law by forcing workers to misrepresent the number of hours they actually worked. According to a New York Times investigation, such worker exploitation is common among nail salons.

FMLA Bootstrap Argument Rejected: When a data analyst was terminated based on a pattern of poor attendance due to medical problems, she sued alleging various violations, including interference with her FMLA rights because she had notified her employer that she would need FMLA leave. A Superior Court judge has rejected that claim, because she had not yet worked long enough to be eligible for FMLA benefits. The fact that she would have been eligible by the time the requested leave began was not sufficient to support her claim.

Correction: In our last edition we reported that the former head of the Office of Labor Relations for the State of Connecticut, Linda Yelmini, had been appointed to the State Board of Mediation and Arbitration as a management member of the panel of arbitrators. In fact she was appointed (and is now serving) as a neutral member of the panel. The appointment was part of a settlement of legal claims arising from her separation.