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Employment Law Letter

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Labor & Employment Practice Group

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Mistakes to Avoid When Firing Someone

While most employers are well aware of the statutory risk factors that can complicate a discharge, some recent court decisions underline the importance of considering how a termination could be perceived by an objective third party. For example, timing can be critical. Has the employee recently engaged in conduct or exercised a right that could lead to a perception of unlawful retaliation if he or she is disciplined or discharged?

A federal court in Connecticut faced that issue in a case involving an employee who was fired one day after she started FMLA leave for Lyme disease. Her employer, a public utility, argued that although she was a 15-year employee, her performance and attitude had been poor for some time. However, the court noted that she had not been placed on a performance improvement plan, and there was some evidence that her supervisor thought that her disease might adversely impact her performance.

The case is not over; the court simply refused to grant summary judgment to the employer. It will be up to a jury to decide whether the employer's stated reasons were pretext for retaliation. However, convincing a jury that the plaintiff's FMLA leave had nothing to do with the termination decision may not be easy. The average juror is probably more sympathetic to employees than employers, and the timing will be tough to explain away, to say the least.

Similarly, judges and juries are often suspicious of employers whose explanation for a discharge decision is less than consistent. An at-will employee is not entitled to an explanation of the reason for termination, but most employers sensibly provide such an explanation. In any subsequent litigation, however, the employer will be required to provide a legitimate, non-discriminatory reason for the termination in more detail than may have been provided to the employee. Employers must ensure that they are being consistent with the original explanation to the employee. "Elaboration" on the original reason is fine, but "shifting" reasons can lead to big verdicts.

In one recent case, the employer fired an employee for poor performance, and then provided additional examples of performance problems in the ensuing litigation. A federal appellate court noted that the employer's supplemental explanation in the lawsuit was not a substantial shift in its original reason for the termination, but just an elaboration of the original reason, which was permissible and appropriate.

In another case, however, an employee who

sold homes was transferred by her employer from a "booming" district to a less profitable one, which caused her to quit within four months due to a lack of sales. In a constructive discharge lawsuit, the employer explained variously that the transfer was a staffing change, a promotion, a way to "dismantle the partnership," or for training needs. The court found that these shifting reasons furnished sufficient support for the jury's $300,000 verdict in favor of the employee.

Our advice is to develop a checklist of issues that can be potentially problematic if an employee (especially a long service employee) is terminated. These include issues of age, race, gender and other protected categories, but also whether the employee has recently engaged in some protected conduct or activity. If so, there should be some precipitating cause that is significant enough to outweigh the potentially suspicious timing. Employers should also have a clear and consistent explanation for a termination. If it is actually because the employee can't get along with his/her supervisor, don't say it is the result of a non-existent reorganization, since that can be easily disproven in court.

Reasonable Accommodation: A Matter Of Opinion?

When employers consider whether or not to make an adjustment in job duties or work schedule in order to accommodate an employee with a disability, the question is complicated by the fact that the answer may depend on an opinion, ultimately that of a judge or a jury. Two recent court decisions in Connecticut, one by a state judge and the other by a federal jury, and both involving special education aides in local school districts, illustrate the point.

In the state case, the plaintiff suffered from several debilitating ailments that resulted in frequent absences. She argued that not penalizing her for those absences under the district's attendance policy was a reasonable accommodation for her disability under Connecticut's Fair Employment Practices Act. However, the judge dismissed her claims, concluding that regular attendance was an essential part of her job because she was assigned to assist specific special education students.

The federal case involved an aide who injured her shoulder, and thus had difficulty feeding, lifting or toileting her students. Her doctor said she should be placed on light duty, but the school district said that was not an available option, and terminated her. She filed a complaint under the Americans with Disabilities Act, and her case ended up before a jury.

While the employer's witnesses testified that the duties in question were essential functions, the plaintiff said that several students she worked with only needed classroom help. The jury found in her favor. Her lawyer credited the result in part to the testimony of a co-worker who had physical limitations that were obvious to the jury, but who had been kept on the job while the plaintiff was not.

Our advice is that when faced with a request for an accommodation for an employee with a disability, an employer would be wise to reduce the risk of litigation by making every reasonable effort to grant it, or at least to offer a trial period to see whether the arrangement is workable. This is especially true in the case of a condition that is likely to be temporary, so any inconvenience or disruption may be limited in time.

Supreme Court Narrows Whistleblower Protection

In a unanimous decision, the U.S. Supreme Court has ruled that protections afforded by the Dodd-Frank Act to "whistleblowers" – employees who report suspected violations of securities laws – apply only to reports to the SEC, not to an employee's internal report of misconduct to a supervisor or other company official. In other words, the court narrowed the protection against retaliation so as to exclude employees who only inform their employer's management about their suspicions.

Prior to the Supreme Court's ruling, the SEC interpreted whistleblower protections under Dodd-Frank more broadly. The decision in *Digital Realty Trust, Inc. v. Somers* centered around an employee who told senior management he suspected that Digital Realty was violating certain securities laws, and was subsequently terminated. In its opinion, the court reasoned that the text of Dodd-Frank expressly defines "whistleblowers" as those who alert the SEC to their suspicions of fraud, and explained that its ruling is in line with Congress' intention "to motivate people who know of securities law violations to tell the SEC."

The court's decision will likely result in fewer retaliation claims under Dodd-Frank, which may seem like good news for employers. However, because the decision encourages employees to go directly to the SEC with any suspicions of wrongdoing, it may also hinder an employer's ability to investigate concerns internally and correct any problems before the government gets involved.

Our opinion is that employers should encourage their employees to report any sort of potentially illegal behavior to a designated company representative, and should ensure that they are not retaliated against for doing so. While Digital Realty Trust may have dodged a bullet, employees who blow the whistle internally are still protected against retaliation under other the Sarbanes-Oxley Act and other federal and state statutes.

Who Is The Employer Of A Staffing Agency Temp?

Many businesses bring on extra help for temporary or seasonal needs, and some even do all their hiring from the ranks of such workers, a practice known as "temp to perm." Often the easiest way to find this kind of help is to contract with a staffing agency. But not all companies understand the details of the employment relationship in such situations. In particular, who is the employer, the borrower or the lender?

The answer to that question matters a lot when things go wrong, ranging from a workers' compensation injury to an employee lawsuit over alleged discrimination. In the case of workers' comp, Connecticut has a statute that provides the answer: the entity that lends an employee to another business is deemed to be the sole employer of the loaned employee, even if he or she is injured while working for the borrower.

Interestingly, a recent court case holds this answer still applies in a case of workers' comp retaliation under Section 31-290a. That means that if a staffing agency temp has a workers' comp injury while working for one of the agency's customers, and the customer tells the agency not to send that employee back after recovering because he or she is accident prone, the injured employee can't bring a claim of workers' comp retaliation against the customer.

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On the other hand, the same judge ruled that a borrowed employee can file a discrimination claim against the borrower under the Fair Employment Practices Act, provided two tests are met: one, the borrowed employee is paid directly by the borrower, and two, the borrower has the right to control the means and methods by which the employee performs the job.

Our advice to employers who use staffing agencies to supplement their workforce is to spell out their business relationship in sufficient detail so that there are no surprises with regard to which party is subject to what kinds of claims if a borrowed employee becomes disgruntled and consults a lawyer.

Legal Briefs *and Footnotes*

SCOTUS Broadens FLSA Exemption: The Supreme Court recently decided that an FLSA exemption applicable to "any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles" excludes service advisors from overtime pay requirements. That may not be big news in itself, but commentators have noted that the impact of the decision may be much broader because the justices in effect did away with decades-old precedent stating that FLSA exclusions should be "narrowly construed."

Fired for Filing a Lawsuit? An employee of a provider of medical equipment and pharmaceuticals was injured in a fall on a sidewalk outside her employer's office. Although she received workers' compensation benefits through her employer, she also sued the employer's landlord. Fearing a negative impact on relations with the landlord, the employer fired her, which resulted in a lawsuit against the employer. A Connecticut Superior Court has ruled, in a thoroughly reasoned opinion, that while an employee may consult a lawyer without fear of retribution, filing a lawsuit enjoys no such protection. The employee's claims were rejected.

Immigration Developments: The FY 2019 H-1B lottery season opened on April 2, and thousands of employers are hoping their petitions will be selected to receive one of the coveted H-1B visa numbers. If things go as they did last year, however, winning the lottery may be just the beginning for many of these employers, because USCIS may ask for further documentation, particularly in situations involving entry-level positions and third-party placements. In such cases, a final decision may not be forthcoming for many months, and in some cases for more than a year. Also, the State Department has issued a controversial proposed rule adding new questions to its visa applications. One of the proposed questions would require foreign nationals to provide identifiers for specified social media platforms for the prior five years. Now is the time for employers to plan ahead to retain their workforce!

The Rules Are The Rules: Connecticut's unemployment compensation system is sometimes criticized for being too liberal, but it can be strict too. An Employment Security Board of Review policy says if a claimant fails to participate in a scheduled appeal hearing, the appeal will be automatically denied unless the claimant calls in the same day to explain his/her absence. In a recent decision, a Superior Court judge questioned the wisdom of that policy, but said he had no authority to change it.

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