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Shipman & Goodwin LLP®
COUNSELORS AT LAW

# EMPLOYMENT LAW LETTER

SUMMER 2004

## NATIONAL NEWS

*Connecticut employers should be aware of these important developments at the national level. More information is available by contacting any member of the Labor and Employment Law Department of Shipman & Goodwin LLP.*

- **NLRB Flips Again:** Reversing a position it took only four years ago, the National Labor Relations Board has decided that employees in non-union settings are not entitled to have a co-worker present during investigatory interviews. This marks the fourth time in 23 years the Board has changed its mind on this issue. In a 3-2 decision, the majority said the ever-increasing need for sensitive and confidential workplace investigations of security, violence, harassment and other issues, can best be addressed without the presence of a co-worker.

- **New FLSA Regs:** The revised wage and hour regulations recently issued by the U.S. Department of Labor take effect August 23. The new rules are discussed in a Shipman & Goodwin LLP client alert issued in June. The Connecticut Department of Labor has given no indication yet as to whether it will revise its regulations to match the new federal rules.

- **Indian Casinos Can Unionize:** In a case with significant implications for Foxwoods and Mohegan Sun, the NLRB has decided that it will assert jurisdiction over Indian enterprises, even if they are located entirely within the boundaries of a reservation, unless it would infringe on treaty rights, abrogate Indian self-government, or otherwise conflict with the intent of Congress. Previously the Board declined to assert jurisdiction over Indian businesses located on reservations, even if they served the public at large and many of their employees were not Indians.

# Careful What You Say About Your Employees

More and more workers are suing their employers over negative statements made about them, and Connecticut courts are increasingly sympathetic to their claims.

For example, an assistant manager at an apartment complex was fired for various acts of misconduct, including mis-reporting his hours worked, using the company's postage meter for personal business, and using offensive language on the job. Among the claims he made in a suit against his employer was that his boss told tenants and other employees that he had engaged in sexual harassment.

The judge ruled that a statement to the effect that a supervisor has engaged in sexual harassment, if untrue, constitutes slander per se. This means the plaintiff doesn't have to prove damage to his reputation, or the other elements of a defamation claim. He only has to show that the statement was made to someone other than management members with a need to know.

In another recent case, an Old Saybrook school cafeteria worker claimed she was forced to quit because of harassment allegedly related to her disability, bipolar disorder. Although many of her claims were thrown out of court, one that stuck was her allegation that the principal of her school stated at a public meeting that she had committed theft (taking an ice cream bar). A federal judge said this qualified as "extreme and outrageous conduct" sufficient to impose liability on the defendant.

Earlier this year we reported on a case in which the Connecticut Supreme Court ruled there is no such thing as "compelled self-defamation" in this state. That is, a discharged worker can't sue his former employer because he is forced to tell prospective employers the reason (which he claims is false) for his dismissal. However, in the next stage of that same case, the employee is claiming defamation by "intra-corporate publication." While statements between company officials normally are privileged, the privilege is lost if the statements are made maliciously.

The employee in that case was fired because he presented a "return to work" slip that had been altered to show a later return

date. Human resources personnel accused him of fraud, despite the fact that he returned an hour later with a letter from his doctor to the effect that the note had been altered by his office staff, not by the employee. Now the employer must deal with a claim that the accusation of fraud was made maliciously.

**Our advice** to employers is to consider carefully what management says about employees, and who it is said to. Particular caution is in order when a worker is accused of sexual impropriety, dishonesty, or any type of moral misconduct. The only statements that are absolutely privileged are those made in the course of unemployment compensation proceedings.

# Personal Liability For Unpaid Wages

Most people probably assume there's no way an employer can be subject to criminal prosecution for violating Connecticut's law governing unpaid wages, unless there's a willful failure to pay wages that are clearly owed. That's not the way the courts see it, however.

An idealistic young entrepreneur tried to start a flooring business that would hire unemployed workers in Hartford and teach them a trade. However, after investing in two weeks of training, his first big contract fell through, and he found himself without enough cash to pay his men. The next week the business folded. Eight of his employees complained to the State.

Although the judge said he obviously didn't intend to do anything wrong, the way the law read that didn't matter. He sentenced him to six months on each of the eight cases, with the sentence suspended on three years probation and payment of $13,200 to the workers. An Appellate Court panel of judges upheld the conviction.

**Our opinion** is that personal liability for payments to workers usually is imposed only when the person who runs the business effectively is the company. The lawyers for the entrepreneur is quoted as saying, "the CEO of General Electric is never going to be charged under this statute." Perhaps not, but it would be a mistake for any business to underestimate the consequences of violating the wage laws.

# Non-Compete, Solicit Agreements Explained

It's only one judge's view, but a recent Superior Court decision sheds light on several issues of interest to both employers who are parties to agreements prohibiting solicitation of another's employees, and to workers who are subject to non-compete agreements.

When the Wilton public schools decided to provide occupational therapy services in-house instead of through an outside contractor, it took out newspaper ads to recruit therapists. Two employees of the former contractor applied and were hired. The contractor sued Wilton for violating a provision in their contract prohibiting solicitation of the contractor's employees, and sued the two employees for violating their non-compete agreements.

The judge threw out both claims. As to the school system, the judge said only a solicitation aimed directly at the contractor's employees would violate non-solicitation clause. The contract didn't prohibit Wilton from hiring the contractor's employees if they approached the school system on their own, or in response to a general "help wanted" ad.

As to the two employees, the judge found their contracts prohibited them from going to work for a competitor. The school system wasn't in competition with the occupational therapy service; it merely decided to provide its own services rather than using an outside contractor. After all, the employees didn't contribute to the loss of the contractor's existing customers, or compete with the contractor for new customers.

For employers, perhaps the most interesting part of the decision dealt with the claim that Wilton interfered with the plaintiff's contractual relations with its employees, by hiring them when it knew they were subject to a non-compete requirement. The judge said this by itself wasn't enough to be actionable; there had to be some improper motive or improper means involved in the hiring in order to create any liability.

**Our opinion** is that both non-compete and non-solicit clauses are used in contracts more often than is necessary, and sometimes impede the mobility of employees in situations where their employers would not suffer any real harm. Some companies try to enforce such clauses even when there isn't much at stake, and their action sees petty or vindictive. The Wilton decision represents a victory for reason and common sense.

Shipman & Goodwin LLP

**EMPLOYMENT LAW LETTER**

is published quarterly as a service to clients and friends by the firm's Labor and Employment Law Department, with the cooperation and assistance of the Litigation Department and Employee Benefits Group. The contents are intended for general informational purposes only, and the advice of a competent professional is suggested to address any specific situation. 

## LEGAL BRIEFS
### *and footnotes*

**AIDS on the Job**: The Connecticut Supreme Court has ruled that AIDS is a job hazard, at least for members of the emergency response team in a state prison. Given the high rate of HIV infection among inmates, the justices said people whose job it is to break up fights and riots should not have to worry about whether they have some protection under workers' compensation. The case was brought by the family of a Bridgeport corrections officer who was diagnosed with HIV in 1992 and died a year later.

**Yale Prof's Porn**: A geology professor at Yale was convicted of downloading child pornography from the internet, and appealed in part because he had been turned in by a co-worker who had accessed his computer and turned the images over to police. He argued he had a reasonable expectation of privacy in the workplace, and the conviction violated his privacy rights. A Superior Court judge rejected his claim, and now the Supreme Court has affirmed that decision. However, it relied on the fact that the professor admitted to possession of other child pornography, so the computer images were not essential to his conviction.

**Outlaws in Corrections**: A federal judge has thrown out a lawsuit by a group of correctional officers who claimed that the State could not discipline them for participating in the Waterbury area chapter of the Outlaws motorcycle gang. The court said the gang's involvement in drug trafficking, violence, sale of stolen motorcycle parts and association with white supremacists established a sufficient public interest in keeping prison guards out of the organization, especially since the Outlaws and rival Hell's Angels are well-represented in the prison population. Their freedom of association claims were rejected.

**No Notice of Disability**: A school custodian in Hamden was fired because he repeatedly violated instructions not to remain in his school after his shift ended at 9 p.m. He brought a disability discrimination complaint, asserting that his behavior was caused by obsessive compulsive disorder, and he felt he couldn't go home until his assigned duties were completed to perfection. A Superior Court judge pointed out he had never told the school district he had a disability, and rejected his claim that they should have inferred from his conduct that he had a psychological problem.

**Deferred Commissions**: In our last issue we reported on a case where an employer was thwarted when it tried to change the commission schedule on cell phone usage after a salesman had earned the commission by selling the phone. A more recent case takes a similar view where the relationship with an agent on commission ends. The judge said commission payments must continue if the agent has done everything he needs to do to earn the commission. The case involved long term sales agreements negotiated by the agent, under which a commission was payable whenever an order was placed pursuant to the agreement.

**Horseplay Not Assault**: A teacher's assistant claimed benefits under the Connecticut statute that provides benefits beyond workers' compensation for educational personnel assaulted in the line of duty. However, a judge decided the law didn't apply where a student jumped on the claimant's back and asked for a ride. He said the normal understanding of an assault is where there is an intentionally violent and hostile attack, and this was just "horsing around."

**S&G Notes**: Our firm's Hartford office has relocated to One Constitution Plaza. Clients and friends are welcome to stop by for a visit to our new quarters . . . The latest addition to our Labor and Employment Law Department is **Dana Baughns,** an employment litigator in our Stamford office.

# Revoking Job Offer Is Risky Business

It is axiomatic, at least in Connecticut, that an at-will employee can be terminated at any time for any lawful reason. But can an offer of employment, once accepted, be revoked with equal ease? Apparently not.

An employee of a temp agency was placed at a Unilever facility. While working there, she was offered a regular position by the company, first orally then in writing, and she accepted. After resigning from the temp agency, she showed up for her new job, only to be told the offer was being rescinded because she wasn't qualified.

She sued, but Unilever argued that it was free to end an at-will relationship, even before it began. The court disagreed, and the plaintiff had viable claims of promissory estoppel, negligent misrepresentation and perhaps even fraud, depending on what came out at the trial about the company's changing views of her qualifications.

The court's opinion includes an interesting discussion of the difference between this case and one where an at-will employee is terminated after her first day on the job. While the two may seem very similar, there are important differences in the harm the employee suffers. In the second case, the employee will likely collect unemployment compensation, and perhaps be eligible for COBRA benefits, where in the Unilever case she was not.

**Our opinion** is that Unilever would have been better off letting the employee start work, and if they terminated her thereafter they would at least have a better basis for demonstrating that she was not suited to the job.

# Policy Issues Explored In Police Union Cases

It seems some of the most interesting issues in labor relations arise in cases involving police unions. Perhaps it's because of the unique role police play in our society, or the quasi-military nature of police departments, or both.

Some time ago we reported on a State Board of Mediation and Arbitration case where an Ansonia police officer, who was fired for making sexual advances toward several female citizens in the course of his work, was reinstated by the arbitrators because the City failed to comply with certain procedural requirements in the discipline provisions of the union contract.

Recently a court struck down the arbitration decision because it was contrary to public policy. The judge said the officer's conduct exposed the City to potential liability, and violated departmental rules and prohibitions against sexual harassment.

**Our opinion** is that the arbitrators probably would have upheld the officer's discharge if the contract didn't contain such cumbersome procedural requirements. Too often, municipalities agree to such constraints (sometimes called the Policemen's Bill of Rights), based on union arguments such as the need to protect their members from false accusations by criminal elements. However, one might argue that there ought to be fewer obstacles to disciplining or removing bad apples from the police force than from other jobs, not more obstacles.

Another recent court decision involved a Meriden police officer who was disciplined because of the testimony she gave in a grievance arbitration hearing over her removal from a particular assignment. A departmental investigation concluded that her statements were false, unprofessional, and reflected discredit on the department. When she complained to the State Board of Labor Relations that the discipline violated her right to pursue a grievance, the SBLR said her statements were not privileged because they were found to be false.

The judge overruled the SBLR, and said that there had been neither a charge nor conviction of perjury. Where the SBLR said the employee could assert a testimonial privilege only if she proved her statements were true, the judge said the employer had to prove her statements were false. A good faith belief that the employee lied was not enough to destroy the testimonial privilege that applies in labor board cases and arbitration proceedings.

**Our advice** to employers is to leave well enough alone. In the Meriden case the employee lost her original grievance, and that should have been the end of the matter. The judge's decision was probably based in part on an impression that the employer was "piling on."

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