Shipman & Goodwin LLP

Employment Law Letter

Winter 2007

$12 MILLION VERDICT BY CT JURY SHOULD GET EVERY EMPLOYER'S ATTENTION

Well over 90% of employment lawsuits settle. Of those that don't, most result in modest liability for the employer, or none at all. But once in a while a case comes along that serves as a reminder of just how wrong things can go, especially when there's a jury involved.

Late last year, a federal court jury in Bridgeport hit Stamford-based General Electric with a verdict of over $12,000,000, including $10,000,000 in punitive damages, in a lawsuit brought by an engineer from India who claimed GE treated older, Asian employees less favorably than younger, white employees. He alleged that after he complained about younger employees being promoted over him, he was abruptly terminated. An army of lawyers is fighting to reduce the award, but they have their work cut out for them.

This case represented a "perfect storm" of bad news for the employer. The plaintiff was in the protected age class (54), had suffered two heart attacks and was on dialysis due to kidney failure, so his chances of finding a comparable job with another employer were not good. The court found this justified future damages in the form of "front pay," as well as back pay. Worst of all, the punitive damages were awarded under a statute to which statutory damage caps are not applicable, and most insurance policies will not cover punitive damages.

IN SUMMARY:

This issue inaugurates a new look for our Employment Law Letter, one that is more consistent with the format used by other practice groups within our firm. However, we continue to strive for the same lively and informative content that has held the interest of loyal readers for over 20 years.

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Our advice to employers has always been to take a hard-headed look at employment lawsuits and assess how the facts could play to a sympathetic jury. After all, most jurors identify with employees, not their bosses, and defense costs can approach or exceed six figures, win or lose.

COURTS OVERTURN ARBITRATION AWARDS, CITING PUBLIC POLICY AND MANAGEMENT RIGHTS

Usually, courts are reluctant to set aside the decisions of labor arbitrators, partly because they don't want to encourage everyone who loses an arbitration case to file a lawsuit, and partly because the parties to a labor contract have bargained for a decision by an arbitrator, not a judge. But there are exceptions.

One increasingly common exception is where a court is convinced an arbitrator's decision violates some important public policy, for example placing a child molester in a teaching position. Most (but not all) such cases arise in the public sector, and many involve municipal police departments. Some recent examples:

- The Town of Bloomfield convinced a judge to overturn an arbitration award that reinstated a police officer terminated for making false statements in an investigative report. The judge was persuaded by arguments that the prosecution would have to disclose the officer's history in every future case in which he was involved, and defense counsel could use that information to impeach any testimony from the officer.
- Another arbitrator ordered a New Haven police officer returned to patrol duty after he shot and killed an assailant, despite the fact the Chief had assigned him to administrative duty out of concern for his psychological condition. A judge set aside that award, because the contract clearly stated that assignments were the Chief's prerogative. Although the arbitrator found the Chief's decision not to return the officer to patrol duty until he submitted to counseling was unreasonable, the judge said since the Chief's decision was not a disciplinary one, it was his decision to make.
- A manager in Bridgeport city government claimed she was wronged when her position was eliminated and she was not permitted to "bump" into another city job in a different bargaining unit. An arbitrator agreed. However, a judge ruled the arbitrator had no power to make a decision that impacted a position in a unit represented by another union, one that wasn't even represented in the arbitration proceeding.

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JUDGE'S CLAIM TO WIFE'S PENSION REJECTED BY ANOTHER JUDGE

Superior Court judge Robert McWeeny represented employees and unions in labor and employment matters when he was a practicing lawyer. Therefore, he was on familiar ground when he filed a discrimination claim after the City of Hartford cut off his $24,000 per year survivor benefit under his deceased wife's pension plan. The benefits stopped because McWeeny remarried, which he claimed constituted discrimination based on his marital status.

First he went to the CHRO, but a hearing examiner dismissed his claim because he was not an employee of the City. He then appealed to Superior Court, where the CHRO joined him in contesting the decision of its own hearing examiner.

The court agreed that McWeeny had suffered financial harm, and that the City's action was based solely on McWeeny's marital status. However, the judge concluded that he did not have standing to assert a claim of employment discrimination, because he was not (and never had been) an employee or applicant for employment with the City of Hartford. In a lengthy opinion, he wrote that McWeeny wasn't within the "zone of interests" that Connecticut's Fair Employment Practices Act was intended to address, namely employers denying equal employment opportunities to employees because they are (or are not) married.

Our opinion is that termination of survivor benefits upon remarriage is common among pension plans, and that different treatment of married people is widely accepted in our society. Take for example joint filing of income taxes, and the "marriage penalty" built into the social security system. While the pension feature that took Judge McWeeny's benefits away may have its origins in antiquated assumptions about spousal support that are no longer valid, any move to change such a common practice probably should be legislative, not judicial.

CAN CHURCHES DISCRIMINATE BASED ON RACE IN THE NAME OF RELIGION?

This intriguing question was presented in a CHRO complaint brought by a Catholic priest from Africa, who was passed over for promotion in his parish in Rockville in favor of a white person. What are the limits of government's ability to regulate the affairs (and specifically the employment practices) of religious institutions?

Ultimately the CHRO, a reviewing trial court, and most recently an appellate court concluded that the state could not interfere with a church's choice of clergy. The appellate court's opinion, however, falls short of a "free pass" for religious institutions when it comes to anti-discrimination laws.

First, the court drew a distinction between religious beliefs and religious practices. The latter are not protected from governmental regulation, because if they were each person's beliefs would make him "a law unto himself." Fundamentalist Muslims could refuse to hire women, and Mormons could take multiple wives. However, the constitutional guarantee of "free exercise of religion" allows each religion to choose the people through whom it communicates its religious messages. In other words, the Catholic church can decide who can become a priest, and which priests are assigned to various positions within the church.

However, the court said this freedom of choice is confined to the ranks of the clergy. A church is not free to discriminate when it selects its bookkeeper or other lay employees, and in such cases anti-bias laws apply just as they would to any other employer.

U.S. SUPREME COURT MAKES NEWS BY DECLINING TO HEAR CASES

Usually we think of the United States Supreme Court making legal headlines through the cases it decides. But often the high court makes significant decisions by refusing to hear a case, because that means a lower court opinion on the issue in effect becomes the law of the land. Three recent examples make the point.

- A postal worker on leave under the FMLA provided a return-to-work certification from his doctor, but refused to submit additional documentation required by USPS under their union contract, including the nature of his illness, course of treatment, dates of incapacity, and any medications he was taking. He was terminated, and brought suit. The trial court found the additional requirements violated the FMLA, but the appeals court reversed, and deferred to DOL regulations that say state or local laws or even union contracts can establish more stringent return to work requirements than the FMLA itself. By refusing to hear the employee's appeal, the Supreme Court in effect endorsed that conclusion.
- When an appeals court affirmed an injunction requiring the successor to former manufacturer J.I. Case to provide free lifetime health insurance to almost 5,000 retirees and spouses, the employer appealed to the Supreme Court. It asserted that different appellate circuits applied different standards in deciding whether union contracts providing for retiree health insurance were intended to assure guaranteed lifetime benefits, and urged the justices to adopt a uniform approach. When the high court refused to take the case, the message was clear. The justices are not prepared to announce a one-size-fits-all template to be used in such situations, and instead will allow each case to be decided based on its own facts and circumstances.
- We have previously reported on efforts by participants in cash balance pension plans to convince courts that such plans discriminate against older employees, by crediting younger employees with larger amounts per year of service based on the longer periods that contributions on their behalf will accrue interest before their assumed retirement date. Last summer a federal appeals court rejected that claim in a case seen as the most significant test of this issue, brought on behalf of 250,000 current and retired IBM workers. Now the Supreme Court has refused to hear their appeal, which observers believe settles any discrimination issue with respect to other cash balance plans.

LEGAL BRIEFS . . . *and footnotes*

Ultimate Irony: A retailer of maternity clothing has agreed to pay $375,000 to settle a lawsuit brought by the EEOC alleging that it refused to hire qualified female employees because they were pregnant. The company cited the potential costs and "distractions" of protracted litigation.

Do Unemployment Regs Discriminate? Two Connecticut women appealed from the denial of jobless benefits by unemployment compensation administrators, asserting that the requirement contained in the Labor Department's regulations that claimants must be available for full time work was discriminatory. Both had disabilities they claimed prohibited them from working full time. The court said since the UC administration had no power to rule on the validity of its own regulations, that issue couldn't be raised on appeal either. The claimants either had to bring a separate lawsuit challenging the regulations or file a charge with the CHRO.

Cell Phone Requirement: An employee of New Britain General Hospital has lost his bid to get paid for time he was required to be available by cell phone to respond to emergencies. Though he argued this requirement made him "on call," which obligated his employer to pay for his time, a judge disagreed. There is a subtle but important distinction between being "on call," where one's freedom to engage in other activities is substantially curtailed, and being "subject to call," where one simply has to be available by phone if needed.

Wrongful Discharge and the NLRA: Connecticut courts generally will entertain wrongful discharge claims when an employee is fired for a reason that violates an important public policy. However, when an employee filed suit alleging he was terminated for bringing to management's attention the complaints of co-workers his case was dismissed. The reason? The National Labor Relations Act governs "concerted activities [for] mutual aid or protection," whether the employees are unionized or not. The employee had to bring his claim to the NLRB or file a lawsuit in federal court.

IT Support Specialists and the FLSA: A recent DOL opinion letter serves as a reminder that IT experts are not necessarily exempt from wage and hour rules. The letter said IT support specialists who basically provide help desk services to their company's other employees do not fall under the FLSA computer exemption. Connecticut employers should remember that CT DOL does not follow the FLSA rules on computer workers, so IT employees are only exempt if they meet the rules for the administrative or professional exemptions.

Too Many Doctor Visits: Sometimes a few casual comments are all it takes to undermine the defense of an employment lawsuit. A federal district court judge in Connecticut recently found an employee had presented sufficient evidence to support claims of retaliatory discharge and violation of the FMLA when he was fired after a workers compensation injury and related medical treatment. He quoted his supervisors as saying he was not really injured, his doctor visits were suspect, and when he asked why he was fired, he was told "you had too many doctors' appointments."

S&G Notes: We congratulate **Gabe Jiran**, the latest member of the Labor and Employment Law Department to be made a partner in our firm . . . Our annual spring seminar for public sector employers will be held on **March 29**. If you have not received an invitation, please contact Sandy Swain at (860) 251-5746 or sswain@goodwin.com.

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