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Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

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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.

- **Employee Free Speech:** The U.S. Supreme Court ordered a rare rehearing in a case involving a prosecutor allegedly retaliated against after writing a memo to his boss alleging a deputy sheriff may have lied in an affidavit supporting a request for a search warrant. While public employees enjoy First Amendment protection for statements on matters of public interest or concern, it is not clear that this extends to matters falling within their specific job duties. The rehearing was apparently intended to give newly appointed Justice Samuel Alito an opportunity to participate in the decision.
- **FLSA Exemption:** A federal appeals court has ruled that the wage and hour exemption for doctors, lawyers and teachers does not apply to physician assistants and nurse practitioners because they do not actually practice medicine. Therefore, such employees are only exempt if they meet the requirements for professional status, including being compensated on a salary basis.
- **Title VII Threshold:** An employer must have at least 15 employees in order to be subject to the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. However, according to a recent ruling of the U.S. Supreme Court, it's up to the employer to assert in a timely manner that it is too small to be covered. A New Orleans café waited until after losing a sexual harassment case to raise the issue, and the high court ruled that was too late. In other words, having 15 employees is not a requirement that deprives the courts of jurisdiction if it is not met.

Off-Duty Misconduct Creates Lively Litigation

Can an employer discipline an employee because of conduct occurring outside of work? The answer generally depends on whether the behavior impacts the employee's ability to do his or her job effectively. Regardless of who wins or loses, the cases on this topic almost always make interesting reading.

For example, a corrections officer recently won reinstatement from an arbitration appointed by the State Board of Mediation and Arbitration after being fired for membership in the Outlaw Motorcycle Club. It seems the employee's membership was only sporadic, and he had previously been told by the warden that belonging to the club was not grounds for discharge unless he engaged in illegal activity. The arbitrator noted that reports the officer tried to recruit inmates for the club were uncorroborated, and that other officers who joined the club only received warnings. However, the arbitrator's order of reinstatement left the officer without pay for more than 19 months.

A Hartford police officer fired for drug-related activity fared much worse, despite being acquitted in a criminal proceeding. When another man admitted to processing heroin, the police went to his apartment, and the officer opened the door. Although he denied knowing the drug offender, a search of the apartment turned up evidence he was staying there. He was charged with drug trafficking, and although he was not convicted he was fired for conduct unbecoming an officer.

He brought suit seeking reinstatement and back pay, and demanding reimbursement of his legal expenses under a statute mandating indemnification of police officers who are charged but not found guilty of offenses allegedly committed in the course of their employment. The trial court rejected both claims, and now an appellate court has affirmed that decision.

Concerning the City's discharge decision, the court pointed out that a criminal conviction is not necessary to establish "conduct unbecoming an officer," and proof beyond a reasonable doubt is not required. As for the claim for indemnification, the judges found the officer had established no nexus between his drug-related activities and his official duties as

a police officer. They drew a distinction between his case and another one involving a Hartford police officer accused but cleared of sexual assault. That incident allegedly took place while the officer was responding to a report of child abuse.

Last year, we reported on yet another Hartford police case, where a federal court upheld an order that officers must cover spider web tattoos that are viewed as symbols of racist violence. Now the federal appeals court with jurisdiction over Connecticut has affirmed that decision. It rejected constitutional freedom of expression, due process and equal protection claims, because the tattoos other officers were allowed to display were not viewed as racist, and because the police department's interest in preserving a professional image outweighed any interest the officers had in displaying their tattoos while on duty.

Our opinion is that the specific occupation of the plaintiffs in these cases was crucial to their outcome. What other employees do on their own time, or how they appear, may have significantly less impact on their ability to do their jobs. Most employers should think twice before taking action against an employee because of off-duty conduct, personal appearance, or other matters that may be viewed as private. This is especially true of public employment, where constitutional issues may be involved.

Courts Act to Protect Employee Benefits

A Connecticut case got national attention recently when a federal judge ruled that a FleetBoston employee could proceed with a lawsuit against the bank because it changed from a defined benefit retirement plan to a cash balance plan that she claimed discriminated against older workers. Cash balance plans have become popular with larger employers seeking to make their pension costs more predictable. They are attractive to many younger workers, and those who may change jobs, but are viewed as less appealing to older workers than defined benefit plans, whose value tends to escalate significantly as an employee nears retirement age.

Like many ERISA cases, this one is complicated, with several different employee claims involved. While some of them were dismissed, the Judge Janet Hall found merit in others. For example, the bank did not adequately notify employees that when their defined benefit was frozen and they were credited with a hypothetical cash balance instead, it would be several years before that balance exceeded the value of their frozen benefit. Similarly, employees were not informed that the annual additions to their cash balance would get smaller as they got older.

Some issues with which the judge had problems involved technical computations. One was that an employee's initial cash balance computation was discounted to reflect the fact that under the defined benefit plan, no benefits would be payable if the employee died before reaching retirement age. However, there was no mechanism for restoring this reduction as the employee approached retirement and the risk of pre-retirement death dwindled. Another problem was that while FleetBoston used a 7 percent interest assumption in calculating the value of an employee's frozen benefit under the old defined benefit plan, it failed to include a mechanism for adjusting the balance when interest rates fell below that level.

In allowing the employee's claims to proceed, Judge Hall was departing from decisions in similar cases from other jurisdictions. It will be interesting to see whether this decision causes employers to think twice before switching to cash balance plans, or only causes them to be more careful about how it designs and implements such plans.

Another recent Connecticut case, this one involving CIGNA, addressed another ERISA question, namely which summary plan description (SPD) controls when an employer changes its SPD before an employee retires. A federal appeals court panel ruled that disability benefits should be determined in accordance with the SPD in effect when an employee becomes disabled, not the revised SPD in effect when he actually retires.

Our advice to employers is to review carefully any written descriptions of its retirement plans, and to include appropriate reservations of the right to interpret and apply the provisions of those plans. All the recent publicity about evaporating retirement benefits seems to contribute to judicial sensitivity to ERISA claims.

Unilateral Change Cases Continue to Confuse

Every year, the largest category of cases decided by the Connecticut State Board of Labor Relations (other than routine election cases) are those involving claims that an em-

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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

Anthem Proceeds Contested: In what may be the last of the litigation over the proceeds of the Anthem demutualization several years ago, a suit by AFSCME against Anthem and several municipalities around Connecticut claiming union members should have benefited from the money paid to municipal employers has been dismissed. Because there was no specific claim for monetary damages, the court called the lawsuit nothing more than a request for an advisory opinion, which it declined to provide.

Deposition in Arbitration? Whatever happened to speed and simplicity as the hallmarks of grievance arbitration? A Superior Court has decided that a union representing Department of Corrections employees is entitled to take depositions of DOC employees in preparation for a case before the State Board of Mediation and Arbitration. It seems doubtful this practice will become widespread, in part because two can play at this game, and most unions would not want to face deposition demands from management.

Discharge Overturned: Courts are reluctant to second-guess arbitrators, unless their decisions are contrary to a clearly established public policy. In an unusual case, a Superior Court judge has overturned a 2-1 decision of a panel of arbitrators sustaining the discharge of a 15-year veteran of the Ansonia Police Department for abusing oxycontin. Although the officer had agreed to a last chance agreement because of abuse of prescription drugs, the evidence of his violation of that agreement consisted only of unsworn statements. While arbitrators generally have broad discretion in the finding of facts, the judge felt this was insufficient basis for ending the officer's career. He ordered a new hearing before a new panel of arbitrators.

Avery Heights Strike: When District 1199 called a strike at Avery Heights in Hartford in late 1999, it didn't take nursing home operator Church Homes, Inc. long to start hiring permanent replacements. The union filed charges with the NLRB, claiming management's real motivation was not simply to keep the facility running, but to break the union. An administrative law judge agreed, but the Board itself found no violation, pointing out that hiring permanent replacements is entirely lawful. Now a federal appeals court has remanded the case to NLRB for a better explanation of why Church Homes' failure to tell the union about the replacement workers for several weeks was not indicative of an unlawful motive.

Training Costs Recovered: The Town of Stonington went to court to recover training costs expended on three newly hired officers who left the job before completing three years of service. Although the Town relied on a provision in the police union contract authorizing this action, the officers claimed it violated the Connecticut statute prohibiting "employment promissory notes." The court disagreed, citing an exception to the statute for agreements resulting from collective bargaining, and it authorized the Town to attach the property of the officers in amounts sufficient to cover their respective repayment obligations.

CT FMLA Clarified: In 2003, the General Assembly amended Connecticut's FMLA requirements to permit employees to use up to two weeks of their "accumulated sick leave" to deal with the serious illness of a family member. SNET claimed the statute only applied to situations where employees are allowed to accrue more sick leave with each year of employment, or to carry over sick leave from one year to the next. A Superior Court judge has rejected that argument, conceding that it is not clear what the word "accumulated" means in this context, but finding no clear basis for adopting SNET's position.

Basketball Isn't Training: A volunteer firefighter in Watertown was injured playing basketball, which he claimed was part of his physical fitness training for the job. A workers compensation commissioner awarded benefits, because the fire department ran the basketball program, and participants earned points toward retirement. The Compensation Review Board reversed that result, concluding that the statute covering injuries suffered "while in training for...volunteer fire duty" refers to training for specific fire fighting functions, not general fitness. A dissenting member of the Board said firefighting is dangerous, and physical training is important to success on the job.

You're Hired...Not: An employee accepted a job offer from DSL.Net and resigned from ADP of Milford, but when he showed up at his new job he was told he wasn't wanted, based on negative reports from a former employer. He brought suit, but his would-be employer successfully defended on the basis of a signed offer letter in which the plaintiff acknowledged he could be terminated at will and was not guaranteed a job for any specified length of time. The court found no difference between terminating an employee and not permitting him to start work.

Scope of Past Practice: Every employer with a unionized workforce has heard the claim, "You can't change that; it's a past practice!" But what if the practice varies from one facility to another within the same bargaining unit? Usually, a practice isn't binding unless it's consistent throughout the unit, but the State Board of Labor Relations has made an exception for large state employee units covering many agencies and locations. Recently, the teacher union in Winsted tried to apply the same logic to school districts, arguing that a past practice regarding preparation time should be protected, even if it didn't apply to all the schools in the district. The Labor Board rejected that argument, and applied the usual rule.

ployer has changed an existing condition of employment without discussing the matter with the union representing the affected employees. You'd think by now the rules would be fairly clear, and disputes would be rare. The fact is, however, that no two situations are exactly the same, and the rules can be tricky to apply when the facts change even slightly.

For example, to be an established working condition, a practice must be consistent and reasonably longstanding. The City of New London recently defected a claim that failure to fund the tuition reimbursement line item in its budget constituted a unilateral change, by demonstrating that reimbursement of tuition costs had always been subject to availability of funds.

Even an established practice can be changed if the applicable union contract permits it. A few months ago the North Branford Board of Education convinced the SBLR that its contract with the teachers' union allowed it to schedule non-student teacher work days without negotiation, even though such a decision would normally require bargaining.

One of the thorniest questions is whether an employer action changes an established working condition, or merely establishes reasonable rules for governing it. When the Town of Newtown established a series of rules regarding the use of sick leave, the SBLR said some of them did not require bargaining, but a requirement of calling in four hours in advance, and a prohibition against leaving home while on sick leave, went beyond reasonable enforcement procedures, and changed the benefit itself.

In the private sector, the easy way for an employer to avoid making the wrong decision about whether a decision requires bargaining is to offer to negotiate it, and if discussion leads to a bona fide deadlock, the employer can implement its last proposal. In the public sector (at least in Connecticut), however, an impasse results in binding arbitration, and an employer may get stuck with a result that's less desirable than no change at all.

Our advice to public employers is to be conservative about making changes that may require bargaining; guessing wrong can be expensive. The SBLR recently found the City of Hartford failed to bargain about a decision to consolidate IT functions with its Board of Education, eliminating several jobs. The Board ordered the City to reinstate a number of employees, with back pay, and to reimburse the union for its costs and attorney's fees, because it found the City's defense to be frivolous.

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