SHIPMAN & GOODWIN LLP℠
COUNSELORS AT LAW

ROUTE TO: ______ ______ ______

EMPLOYMENT LAW LETTER

FALL 2006

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.

- **High Court Redefines Retaliation:** The scope of what constitutes retaliation for complaining about discrimination has been significantly broadened as a result of a recent Supreme Court decision involving a railroad employee. Previously, most claims of retaliation involved discharge, demotion or loss of pay. The court said retaliation could include any action that would dissuade a reasonable employee from filing or supporting a claim of discrimination, such as (in this case) assignment to undesirable duties.

- **NLRB Expands Supervisory Exclusion:** Under the National Labor Relations Act, supervisors have no right to unionize. But what constitutes a supervisor? In a much-anticipated series of decisions involving three different employers, the NLRB has ruled that employees who decide which workers will perform which tasks, if those decisions involve the exercise of independent responsibility and judgment, are in fact supervisors. One area in which this decision may have an impact is health care, where nurses regularly assigned to be in charge of a unit may now be excluded from unionizing.

- **No Tax on Distress Damages:** A federal district court in Washington, D.C. has ruled that damages awarded to an employee because of emotional distress and loss of reputation suffered in connection with some workplace wrong are not subject to federal income tax. The court said the Internal Revenue Code provision making such damages taxable is unconstitutional, because the 16th Amendment only allows taxation of income and sums intended to replace income. Compensation for pain and suffering, even if not caused by a physical injury, is not taxable.

Loose Lips Can Sink Ships, Sometimes

A few stray remarks can get an employer in big trouble, especially if some adverse action is taken against an employee at about the same time. A good example is a recent federal court decision involving a pregnant employee of Connecticut Light and Power who was let go during her probationary period because of poor attendance – missing four days of work during her first month of employment.

The problem was that the absences were due to child care problems, and the employee's supervisor had made several remarks at the time she was hired expressing reservations about whether she was a "good fit" for the job, given her maternity and child care issues. When she filed a lawsuit alleging discrimination based on pregnancy, CL&P argued that her poor attendance would have gotten her fired in any event. She responded that company policy called for progressive discipline, and she was given no warning before being terminated. Although CL&P claimed that policy didn't apply to probationary employees, the court noted there was no such exception in the employee handbook.

The bottom line was that the court could not conclude that "a rational jury" would have to reject the plaintiff's claim that the attendance issue was a pretext for pregnancy discrimination. Therefore, the case was cleared for trial, an expensive process for CL&P, whether it wins or loses. If it had not been for the supervisor's ill-advised comments, the chances are the court would have concluded the employee had not presented enough evidence of discriminatory intent to justify a trial.

Sometimes, however, the employer's justification for its action is sufficiently strong that a few stray remarks won't make a difference. In a decision by another federal judge in Connecticut, an age discrimination claim by a terminated employee was dismissed without a trial, despite the fact that the owner of the business had remarked that "sometimes you have to babysit old men." The employer produced evidence that the employee was fired for "bashing" the company in comments to customers and other third parties, including saying its products were "no good" and its owners were "idiots."

Our advice is to train supervisors and managers about the importance of exercising care in comments made around employees, especially those who may have occasion to use them against their employer. For example, if the supervisor in the CL&P case had simply reminded the employee that she was responsible for finding ways to meet the responsibilities of parenting without falling short of normal attendance expectations, the employee's lawsuit likely would have been dismissed.

NLRB Rulings Affect Non-Union Companies

Most people think decisions of the National Labor Relations Board only impact unionized workplaces. Usually that's true, but not always. Two positions taken by the NLRB recently are important for all private sector employers to be aware of.

One involves mandatory arbitration policies, which more and more employers (especially larger ones) have adopted recently. Such policies generally say employees must address any job-related complaints, including those concerning discipline or discharge, through private arbitration rather than through the courts. However, the NLRB ruled this year in a case involving U-Haul that such policies violate the National Labor Relations Act if they do not make it clear they do not preclude an employee from filing a charge with the NLRB.

The usual way in which this situation would arise is if an employee believed he or she had received adverse treatment because of his or her attempts to start a union or engage in other protected activity. The NLRB would provide the customary avenue for relief, and the Board ruled in a 2-1 decision that a mandatory arbitration policy is unlawful if it could lead employees to believe that route is precluded. This outcome is similar to the position taken by the EEOC, to the effect that employees have a non-waivable right to present discrimination claims to that agency.

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. Reproduction or redistribution is permitted only with attribution to the source.

Another NLRB position that could affect non-union employees relates to confidentiality and non-disclosure provisions. The Board has held that such policies cannot prevent employees from sharing job-related information with union organizers and representatives. For example, a bargaining unit employee cannot be prevented from sharing with his or her union representative information that is relevant and necessary to collective bargaining or contract administration.

However, a non-bargaining employee similarly can't be prevented from communicating to a union organizer information that might be relevant in an organizing campaign. While this generally would not include trade secrets, technical data, pricing policies etc., many confidentiality policies go far beyond such sensitive subjects, and include wage and benefit information.

Our advice is to review company policies on arbitration and confidentiality, including agreements that employees are asked to sign when they are hired, to be sure they do not run afoul of the NLRB concerns addressed above. Any member of Shipman & Goodwin's Labor and Employment Law Department can help with any revisions that might be needed.

Breadth and Depth of FOIA Explored

State and local government employers have been living with the Freedom of Information Act for several decades, and yet they continue to have difficulty complying with it, at least to the satisfaction of the FOIC.

For example, the Commission recently ruled that the City of New Haven violated the Act when it refused to disclose the results of a blood alcohol test of a police sergeant arrested for DUI. The Commission said that even though disclosure might be embarrassing, it wasn't "highly offensive to a reasonable person," and in any event a police officer driving under the influence was a legitimate matter of public concern.

Privacy concerns were also brushed aside in a case brought by the Town of Greenwich against the FOIC after it ordered the disclosure of opinions issued by the Board of Ethics in response to requests from employees for guidance on ethical issues. The court said such documents were not part of employee personnel files, and therefore the "invasion of personal privacy" exception was not applicable. Further, although the ethics opinions often referred to employee finances, investments, charities or affiliations, they were not as personal as a family quarrel, an illness or a sexual relationship.

Another troublesome issue is what documents must be provided in order to fully comply with a request. When a Norwalk teacher asked for all documents related to her employment, she was given copies of her personnel file and a file the principal maintained. She complained to the FOIC

LEGAL BRIEFS
and footnotes

Garcetti Refined: We recently reported on a Supreme Court decision, *Garcetti vs. Ceballos*, holding that a public employee can't use the First Amendment as protection against discipline for statements made in the line of duty. Now a federal judge in Connecticut has limited that ruling to speech involving the employee's specific job duties. Complaints by a nurse at Connecticut Valley Hospital about excessive use of restraints and co-workers sleeping on the job may have been work-related, but were not part of the employee's job description. Therefore, First Amendment protections applied, and her claim of retaliation for exercise of free speech could proceed.

Third Party Harassment? The City of Danbury has defeated a sexual harassment claim brought by a police department employee by arguing that sexually charged comments made by a police captain in the plaintiff's presence were not about her, but about a third party. The judge ruled that offensive comments made to the plaintiff but not directed at her were not sufficient to establish the existence of a hostile work environment. However, as is often the case, the plaintiff's claim she had been retaliated against for opposing discriminatory conduct met a better fate, and was allowed to proceed to trial.

Contract Survives Expiration: When a physician joined a medical group, he negotiated a contract that included a guaranteed salary plus a bonus based on the group's revenue. Although the contract wasn't signed, the parties lived up to it until its stated expiration date. Negotiations over terms for continuation dragged on, but ultimately broke down and the physician left. The group refused to pay a bonus for the period after the contract expired, but the physician sued and a court found the parties intended to continue the same terms. The group had to pay the bonus.

Applicant Not "Employee": The widow of an applicant for a corrections officer position applied for workers compensation benefits after her husband died during an endurance test that was part of the application process. An appellate court panel ruled that the decedent, who had a heart attack after completing a 1.5 mile run, was not an employee when he died because he had neither a contract nor an offer of a job.

Discharge for Reporting Crime: A delivery driver had a run-in with one of his employer's best customers, which allegedly resulted in the customer threatening to shoot him. Although his supervisor instructed him not to inform the police, he did so anyway. The driver claimed that after that incident he was disciplined, his employer stopped accommodating his asthma, and eventually he was fired. Although the company argued he was employed at will, and therefore could be fired for any reason, a federal district court noted that Connecticut laws encourage reporting of crime, so the employee had a viable claim that his discharge violated public policy.

Supervisors Not Liable Under ADA: More than ten years ago, the courts ruled that supervisors are not individually liable under Title VII. Now a federal district court judge in Connecticut has ruled that the same is true under the Americans with Disabilities Act. The judge noted that the definition of "employer" is identical under the two laws, and the logic of the Title VII decisions applies to ADA as well.

Indefinite Non-Compete? A rule of thumb among employment lawyers is that a non-compete agreement that lasts for a year or two is likely to be enforceable, but longer prohibitions are suspect. Recently, however, one Connecticut judge upheld a non-compete for an indefinite period. He pointed out that the agreement only prohibited solicitation of the employer's brokerage customers, it did not restrict the employee from continuing to work in the investment services industry, including the same type of job and same geographic area, and didn't even prohibit him from selling to former customers who approached him, as long as he didn't initiate the contract.

U Comp During Summer: A state statute denies jobless benefits to employees of "educational institutions" during the summer vacation period as long as they have a reasonable expectation of returning to work in the fall. However, when New Britain transferred its school crossing guards from the board of education to the police department, a judge ruled the statute no longer applied and benefits were payable. The judge did say, though, that in computing benefits, base period earnings from the board of education were excluded.

Double Damages for Vacation: A Waterbury Tire and Auto service manager claimed that when he left his job he was denied pay for unused vacation time and for Saturdays for which he had taken no comp time, as he was promised when he was hired. A judge ruled he was owed 11.25 vacation days, plus compensation for five Saturdays, and because the employer's failure to pay was unreasonable, the judge awarded double damages and $10,000 attorneys' fees were assessed. Since the manager's boss was the CEO and sole owner of the company, he was found personally liable for the total, about $13,500.

Cash Balance Turnaround: Earlier this year we reported on a Fleet Bank decision that said cash balance pension plans discriminated against older workers. Two recent developments have restored the viability of such plans. One is a long-awaited decision involving IBM that finds no discriminatory impact in cash balance plans, and the other is the Pension Protection Act, which largely insulates newly established plans from such challenges.

S&G Notes: Almost 150 clients and friends attended our annual fall seminar at the Hartford Marriott on October 19.

that she didn't receive attendance records, grievances she had filed, evaluation documents (including an improvement plan) and complimentary letters about her. The employer claimed her complaint was frivolous, but the Commission ordered it to comply with her requests.

Our advice to public sector employers is to assume any public document is subject to disclosure in response to an FOI request, unless there is a statutory exception that clearly applies. That is certainly the presumption under which the Commission operates.

Federal Jury Awards GE Worker $11M

It's been years since a Connecticut jury has awarded eight-figure damages in an employment lawsuit, but in federal court in Bridgeport the verdict in a discrimination case hit that mark on the basis of punitive damages alone.

The plaintiff, a 52-year-old engineer of Indian descent with kidney disease, was chief engineer in GE's Plainville facility until he was fired in 2003 for "inability to perform well in a team-driven environment." He claimed the company had a pattern of reserving management positions for "young healthy white males," while routinely assigning Asian employees to technical career paths, which rarely led to management jobs.

He also alleged that when he complained about this mistreatment, "workplace retaliation and discrimination intensified." When he took time off for dialysis treatments, he was warned about his poor attendance. After returning from a medical leave in early 2003, he claimed he was assigned to menial tasks. When he protested to the human resources department, he was suspended without pay and ultimately fired. The jury awarded him almost $600,000 in back pay, $500,000 in compensatory damages, and $10,000,000 in punitive damages. GE says it plans an appeal."

Another Connecticut employer, this time an investment brokerage firm, has agreed to pay $1,500,000 to resolve allegations of sexual harassment by a branch manager dating back to 2001, involving at least four female complainants who alleged they were retaliated against and constructively discharged when they complained about the manager. The behavior involved included groping, solicitations for sex, and pressure to wear revealing clothing.

Our opinion is that employers need to take a hard look at the facts that are likely to come out in the trial of an employment case, and make an early decision on whether to fight or settle. The brokerage firm in the harassment case described above probably made a wise decision to settle.

SHIPMAN & GOODWIN LLP
COUNSELORS AT LAW

One Constitution Plaza
Hartford, CT 06103-1919