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Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

SPRING 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.

- **No Reverse Age Bias:** The U.S. Supreme Court has rejected a claim by a group of workers in their 40's to the effect that restricting retiree health benefits to those who reached age 50 by a certain date violates the ADEA. The EEOC's view that younger employees can sue over preferential treatment of their elders is "clearly wrong," according to the majority opinion.

- **Electronic Job Applicants:** The federal government has issued proposed guidelines on what constitutes a job applicant for EEO tracking purposes when an unsolicited application arrives by electronic mail. The information can be found – where else? – on the EEOC's website.

- **New Overtime Rules:** After years of preparation and considerable lobbying by both labor and management representatives, the U.S. Department of Labor has issued new regulations defining what workers are and are not eligible for overtime pay. The new rules do not become effective for 120 days, which is intended to allow employers time to adjust their practices.

- **Weingarten Refinement:** The U.S. Supreme Court has let stand an NLRB decision to the effect that employees requesting union representation in an investigatory interview may choose a specific representative if more than one such representative is equally available The justices brushed aside various employer arguments, including the claim that there would likely be litigation over employer judgment calls on whether an employee's chosen representative is reasonably available.

$500,000 Message: CFMLA Has Teeth!

When a vice president at Cendant Corporation left for maternity leave, she had a good job, was getting good reviews, and was producing good results for the company. When it was time for her to return, she was offered a lesser position and was told her former job was no longer available to her. When Cendant refused to discuss a severance package, the employee filed an FMLA complaint with the Connecticut Department of Labor.

A hearing officer ruled in her favor, and a Superior Court judge upheld her victory on appeal. The ruling was that she had established a causal connection between her leave and her removal from her old position. It didn't matter that part of the business she had been responsible for was sold to another company while she was out. More surprising, it didn't matter that she couldn't prove that Cendant intended to discriminate against her. According to the court, there is strict liability under Connecticut's FMLA law, meaning that intent is irrelevant.

Because the vice president was compensated in various ways, her damages added up to almost half of a million dollars. They included lost wages, bonuses, stock options and severance. Although the employer argued that including all these elements constituted an abuse of the hearing officer's discretion, the court rejected that claim.

Our advice to employers is to be sure they have an airtight business justification before demoting or dismissing someone who has recently exercised FMLA rights, or for that matter engaged in any other protected conduct. In the Cendant case, the employer's problem was that it appeared the employee would have been left in her original job if she had never taken a leave of absence. Even if that wasn't true, it was impossible for Cendant to prove it.

This case also illustrates another mistake employers should avoid, i.e. failure to seize an opportunity to negotiate a compromise settlement early in the course of the dispute. Presumably Cendant could have settled the matter with a modest severance package before both sides became heavily invested in the process, and before the DOL hearing officer's initial decision.

Can Company Impose Cut In Commission?

If you are an employee at will, and have no express or implied contract for a specific duration or a specific level of compensation, your employer can cut your wage or salary at any time for any legal reason. But what if the cut relates to work you have already performed, reducing the amount you were told you would be paid for that work?

This was the question facing a judge in New Haven when a Motorola cell phone salesman sued over a cut in his commission schedule. When he was hired, he was told he would receive compensation based not only on cell phone sales, but also on "residual" commissions based on the customer's use of the phone over time. As the economics of cell phones changed, Motorola cut out the "residual" portion of the commission structure, not just for future sales but past sales on which commissions were still being paid.

When one of the salesmen went to court, Motorola moved to have the suit thrown out, based on the well-known principle set forth at the start of this article. However, neither side could find any Connecticut cases in which the principle had been applied in a way that cut off payments for work done in the past. The judge said he was troubled by letting Motorola out of the deal it made, but wasn't sure the employee should be insulated from any changes, no matter how circumstances might change. He declined to dismiss the lawsuit, but said the employee had some convincing to do when the case went to trial.

Our opinion is that the judge has a tough job, too. Nobody wants to see an employee mistreated, and after all a deal is a deal. However, it does seem incongruous that Motorola could fire the salesman for no reason at all, and yet can't touch his residual commissions. This case highlights one of the problems with litigation. The outcome is "all or nothing", when perhaps the fairest solution would be a compromise.

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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.

ADEA and FEPA Share Age Floor

Everybody knows that the federal Age Discrimination in Employment Act protects people 40 and over from age bias in the workplace. Until recently, however, most practitioners felt that there was no age floor under Connecticut's Fair Employment Practices Act. In theory, someone age 21 could have filed a complaint over preferential treatment of an 18-year-old.

Within the past year, however, two federal court judges faced with this issue have ruled that Connecticut's statute must have been intended to track federal law, and that people under age 40, therefore, are not within the protected class.

The most recent case involved a 37-year-old TV producer working for Channel 3 whose schedule was changed when a younger employee was given her schedule. The court said any time an employment decision is made it will affect employees of different ages, and it would be nonsensical if every such decision were to be actionable. In reaching this decision, Judge Ellen Burns was following the logic of Judge Christopher Droney in a 2003 case.

Our opinion is that recent age discrimination decisions have brought some needed moderation to the tendency of employees to claim age bias at the drop of a hat. In addition to the establishment of an age floor under CFEPA, these include the rejection of the reverse age bias concept, and the ruling that five years or so of difference in age isn't legally significant.

Anthem Proceeds Spark Litigation

When Anthem Blue Cross and Blue Shield decided to demutualize a few years ago, the resulting distribution of cash and stock to policy owners in Connecticut produced a flood of disputes over who is entitled to the money. One of the most hotly contested issues is whether employees who paid a share of the premiums are entitled to a share of the payout.

Since Blue Cross covers the lion's share of public sector employees in Connecticut, unions representing public workers are at the center of the controversy. For example, AFSCME has sued dozens of municipalities on behalf of its members. Teacher unions have also been involved, and in many cases have had to address the complication that board of education employees are covered by municipal plans. Under those circumstances, the demutualization proceeds go to the city or town, not the school board that employs the teachers and has the collective bargaining relationship with their union.

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LEGAL BRIEFS
and footnotes

Arbitrator views "Casino": When a Tilcon employee was fired for leaving a co-worker a voice mail message laced with threats and expletives, his defense was that he only intended to parody a scene from the Joe Pesci movie, "Casino," and meant no harm. An arbitrator ordered him reinstated, and in his written opinion mentioned that as part of his decision-making process, he had viewed the movie. A reviewing court set the decision aside, finding it was improper of the arbitrator to consider evidence not presented at the hearing, which the parties had no opportunity to comment on or respond to.

Last Chance: A Tolland teacher who showed an inappropriate video to his students was allowed to continue working under a last chance agreement. When the press made an FOI request for a copy of the agreement, the teacher objected, claiming it was a "teacher evaluation document" exempt by law from disclosure. An appeals court has issued a ruling rejecting that argument, and finding that a last chance agreement is a part of the disciplinary process and therefore discloseable under the Freedom of Information Act.

16 Strikes, You're Out: When the unemployment compensation administrator granted benefits to a receptionist who was tardy 16 times, the employer appealed. The Board of Review reversed that decision and denied benefits. Although attendance problems generally are not enough to warrant disqualification unless there are at least three no-show, no-call instances within 18 months, the Board found the receptionist's pattern of tardiness, despite repeated warnings, was serious enough to constitute willful misconduct.

Fitness for Duty: After a New Milford police officer took sick leave to deal with his depression and anger, a dispute arose over whether the municipality was entitled to see his medical records in order to assess whether he was fit to return to duty. When an arbitration panel said yes, the police union went to court. The judge agreed with the arbitrators on that point, and also upheld their ruling to the effect that suspending the officer for not producing the requested records does not constitute discrimination on the basis of a mental disability.

Female Firefighters: Women sometimes have a difficult time in the traditionally male world of fire fighting. Within the past month, two decisions in discrimination cases brought by female firefighters in Connecticut have been announced, with strikingly different results. A lieutenant in New Haven who alleged race and sex discrimination won a federal court jury verdict of over $1.4 million plus attorneys fees. However, another federal judge threw out a lawsuit by a Wallingford firefighter who claimed she had been disciplined more harshly than similarly situated men. The judge said she failed to refute the employer's defense, which was that she was suspended for lying about her reasons for wanting time off from work.

Defamation Revisited: In our last issue we reported that the Connecticut Supreme Court ruled there is no basis in this state for a claim of "self-defamation" by an employee who is fired for a reason he claims is untrue but he feels compelled to repeat to prospective employers. The key to that result was that the employer told nobody but the employee why he was fired. In a more recent case, a judge ruled that an employer can be sued for defamation if it repeats the false accusations to co-workers during the course of its investigation into the employee's alleged misconduct. Incidentally, the Supreme Court's rejection of the concept of self-defamation in Connecticut has led a federal court to throw out $500,000 of an $837,000 jury verdict in favor of the employee involved in that case.

Tribes Escape FMLA: A federal appeals court has ruled the Mashantucket Pequots and other Indian tribes cannot be sued under the Family and Medical Leave Act, because Congress did not clearly indicate an intent to abrogate tribal immunity. The court warned that unless Congress acts, workers in tribal casinos may be without many of the protections applicable to other private sector employees.

Giordano's Legacy: Former Waterbury Mayor Philip Giordano negotiated a contract with the city's police union before he left office, and gave away a mulit-million dollar retirement benefit that his sussessor concluded the city couldn't afford. In addition to having major budget problems, the city's pension plan is nearly broke, so the city took the position it couldn't honor that portion of the contract. However, the State Board of Labor Relations recently ruled that the 'impossibility defense" it had previously recognized (but never applied) couldn't be used here, because compliance with the contract wasn't literally impossible. If the impossibility defense doesn't apply to an extreme case like this one, it probably will never be applied.

Chief's Pension Challenged: In an unusual case, the fire union in Windham sued to block the enhanced pension awarded to a deputy chief who was not in the bargaining unit. As is fairly common in police and fire departments, the deputy's pension was provided under the same plan applicable to bargaining unit employees. Although the municipality argued the union had no standing to challenge the computation of the benefit for someone outside the bargaining unit, the court disagreed. At least in theory, overly generous payments to the deputy could impair the plan's ability to provide for union members.

S & G Notes: Nearly 100 clients and friends have signed up for our firm's annual seminar for public sector employers on May 6. For information, please call Sandra Swain at 251-5746 . . . Our firm will be moving it's Hartford office to new space at One Constitution Plaza over the Memorial Day weekend.

The first decisions came from labor arbitrators, and generally favored the unions. For example, teachers in Seymour and Branford prevailed, on the theory that demutualization proceeds were in the nature of premium refunds or investment returns, and those who contributed a portion of the premiums (or investment) should receive a pro rata portion of the returns.

Employers who went to court in an attempt to block arbitration generally fared somewhat better. For example, the Town of Wallingford convinced a judge to block arbitration of a claim for demutualization proceeds by it's Fire Union, because the parties never contemplated such an issue arising, and therefore never intended to arbitrate it. The Wallingford Board of Education promptly followed suit, and prevented arbitration by the Teacher Union, based on the same logic, as well as the fact that the Anthem proceeds went to the town, and the board of education had no control over them.

Recently, however, the situation has become even more confused as a result of court decisions reaching opposite conclusions. One Superior Court judge found that the North Haven teachers could arbitrate their claim to a portion of the Anthem proceeds, while another found that the Branford teachers could not. The two opinions reflect a long-standing difference in judicial views of arbitrability. Some courts feel that parties should not have to arbitrate disputes they never contemplated when they wrote their labor agreements, while other feel disputes should be arbitrated unless it can be said with positive assurance that arbitration wasn't intended.

Our opinion is that since Anthem demutualization payments were based on premium payments, they are most appropriately used to defray future premiums. Those employers who used the windfall to declare a "premium holiday" (usually about three months) generally got no complaints from their unions. After all, a premium holiday benefits employers and employees in the same proportions as their respective premium shares, so it's hard to dispute it's fairness.

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