Employment Law Letter

Fall 2007

GIVING REFERENCES ON EMPLOYEES JUST GOT A LITTLE SAFER

The Connecticut Supreme Court recently gave a qualified endorsement to the practice of giving references on present or former employees to prospective employers or other third parties. The court said there is a "qualified privilege" that protects employers and supervisors from liability for truthfully reporting on the job performance of people who have worked for them. The case, which was discussed in a client alert that was distributed electronically and can be found on our firm's website, involved a former University of New Haven police officer whose strengths and weaknesses were discussed by her supervisors with the Glastonbury and Enfield police departments, where she applied for jobs.

The justices refused to accept the officer's argument that her former supervisors had damaged her prospects for future employment, absent a showing that their statements were recklessly or maliciously false. To hold otherwise, they said, would encourage a "culture of silence" that ultimately would not serve the interests of either employers or employees.

Cautious counsel have been advising clients for years that it is risky to give out information about employees, except to verify dates of employment, title or position, and wage or salary. That's because of the Connecticut statute that prohibits disclosure of information contained in employee files without written authorization. However, the former UNH officer apparently authorized such disclosure, and in any event it wasn't clear that the opinions expressed by her former supervisors were based on any information in her file. Further, shortly before the UNH case was decided, another Connecticut court ruled there is no private right of action

IN SUMMARY:

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under the personnel files law, or the law prohibiting "blacklisting" of employees to make it difficult for them to find other work.

Of course, all this assumes information is given in good faith to a prospective employer. The rules change if false statements are made intentionally, or if disclosures are made to co-workers or others without a need to know. This summer a Waterbury court found an employee had been falsely accused of theft, and awarded her $100,000 in damages, plus an even larger amount in attorneys' fees. Among her claims was that she was too depressed to look for other work, because her friends and even her daughter found out about the false accusations.

Our advice is that the safest approach is to get a written release before saying anything about a present or former employee to prospective employers. Nothing fancy is required; some employers routinely have departing employees sign a one-sentence authorization to provide information to prospective employers, and many companies require that all applicants provide such consent. After all, if an employee refuses to authorize disclosure of information by previous employers, that should tell a prospective employer all it needs to know.

CT UNIONS WIN ONE, LOSE ONE AT NLRB

In an unusual twist, the union trying to organize workers at the new Marriott Hotel next to the Convention Center in Hartford has won a victory at the National Labor Relations Board by *not* having a representation election scheduled. The NLRB refused to process an election petition filed by the employer after the union picketed the hotel, organized a boycott by local and state politicians, and tried to get management to enter into a "neutrality" agreement that would have made the organizing campaign easier.

The employer said the obvious purpose of all this activity was to get the hotel to recognize the union, UNITE HERE, as the representative of its employees, which in other cases has been found to justify an employer-filed election petition. However, the union claimed the employer's motive was to hold an election prematurely, before the union campaign could gain majority support. The union argued that an employer petition could not be entertained unless the union had made a formal demand for recognition, which in this case it did not.

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The Hartford office of the NLRB agreed with the union in 2006, but Washington granted review. After deliberating for more than a year, the Board essentially reversed its position and dismissed the employer's appeal. While there was little or no explanation for the action, the speculation is that the Board felt this was not the right case in which to re-examine the precedent on which the union relied. As a result, unless and until the NLRB takes a different approach in a future case, employer petitions for representation elections will only be entertained when a union has made a clear demand for recognition.

A few weeks earlier, the Board handed UAW Local 376 a significant loss when it ruled that Success Village Apartments was within its rights to bar its employees from purchasing apartments at the Bridgeport co-op without negotiating that issue with the union. The NLRB majority reasoned that the prohibition pertained to housing, not employment, and even assuming that ownership of a unit at the complex constituted a benefit, it was a benefit applicable to any member of the public, not just employees.

Perhaps surprisingly, the majority didn't find it significant that the employer previously allowed its workers to purchase apartments, and in fact had unsuccessfully tried to negotiate a ban on apartment ownership into the collective bargaining agreement. They said those factors didn't convert a non-mandatory subject into a mandatory subject of bargaining. The dissent disagreed, saying the right to buy a unit at the complex obviously is a work-related benefit, in part because it effectively eliminates an employee's daily commute.

Our opinion is that while the Marriott lost a battle, it seems to have won the war. Presumably if UNITE HERE had garnered enough support since 2006 to have won a representation election, they would have asked for one. Meanwhile, the UAW and other unions are setting their sights on Connecticut's casinos. Stay tuned . . .

STATE AVOIDS BIG INCREASE IN PENSION LIABILITY

Connecticut state officials reacted with alarm when an Appellate Court decision upheld the claims of two state employees that pay they received for their unused vacation when they retired should be included in their final year's compensation for purposes of computing their pension benefit. It was estimated that the ruling would require the state to contribute an additional $100 million each year in order to fund its pension obligations. However, the state's Supreme Court has now nullified that decision, endorsing the longtime practice of excluding pay for unused vacation from pension calculations.

The Appellate Court had focused on the fact that the pension statute covering state employees specifies that vacation pay is counted for purposes of computing pensions. However, the Supreme Court said that the purpose of that provision was to assure that each year of compensation was based on 52 weeks, including paid vacation. It was not intended to permit an

employee to “stockpile” vacation time as retirement approached, and thereby inflate his or her final year’s compensation and thus his or her annual pension payment.

The two plaintiffs, who were lawyers retired from the Attorney General’s office, had accrued between them almost $100,000 in unused vacation time. Obviously, counting that money as part of the base on which their pension was computed would significantly increase their retirement benefit, for life. The justices said this would discriminate against peers who took their vacation as paid time off, the purpose for which it was intended.

Our opinion is that if the Appellate Court’s decision had been upheld, there would have been legislative action to reverse that result. Opportunities to manipulate the base on which public sector pensions are computed, such as police officers or firefighters racking up huge amounts of overtime just before they retire, can produce windfalls that unfairly burden taxpayers.

DON’T DESTROY ELECTRONIC EVIDENCE!

Some recent cases have demonstrated how risky it is to erase emails or destroy other electronic evidence that might be used in legal proceedings. A federal judge has sanctioned Norwalk Community College for allowing the destruction of emails and other electronic evidence potentially relevant to a claim of sexual harassment brought by a student against a faculty member.

Although the employer argued any alleged "scrubbing" of computer files or hard drives was accidental or done pursuant to its standard procedures, e.g. deleting all information when an employee left the college and his/her computer was assigned to someone else, the judge found the circumstances were too suspicious to accept this explanation.

As a result the judge ordered the College to pay the plaintiff's expert witness costs and legal fees associated with the destruction of evidence issue, and will instruct the jury that they are permitted to infer that if the electronic information had not been destroyed, it would have yielded evidence that supported the plaintiff's position. The sanctions will make it more expensive and difficult for the college to defend itself in the litigation.

In a separate matter, a Greenwich lawyer has entered into a plea bargain that may result in jail time for allegedly destroying a computer containing pornographic images relevant to a criminal case in which he was involved. The computer belonged to a church whose former music director was allegedly involved in child pornography. The lawyer was charged with interfering in an FBI investigation of the music director.

Our advice is that when you have reason to believe litigation may be imminent, take steps to preserve any documents or communications (electronic or otherwise) that might be used as evidence by either side.

LEGAL BRIEFS *. . . and footnotes*

Bias Claims Accrue When Action Taken: An Appellate Court decision concerning the statute of limitations for discrimination claims filed with the CHRO creates a conflict with federal law as well as several other state laws. In a case involving the Town of Wallingford, the judges ruled the time limit for filing a claim begins to run when the discriminatory action is implemented (e.g. the date of discharge), not when the employee is notified of the action, which may be much earlier.

CT FMLA Sick Leave Rule Clarified: A few years ago, the Connecticut General Assembly amended the state's FMLA statute to allow employees to use up to two weeks of their "accumulated sick leave" for family medical leave purposes. SNET argued that the new law didn't apply to their employees, because their policy didn't allow carryover of sick leave from one year to the next. However, the Supreme Court ruled the disputed provision did apply to the SNET benefit, in part because employees were eligible for larger annual allowances of sick leave as they attained greater seniority.

Wife Fired, Husband Follows, Claim Denied: When an employer fired a female employee, they concluded her husband could no longer function effectively as an employee, so they terminated him too. He filed a complaint based on various grounds, including an allegation of marital status discrimination. However, a federal judge in Connecticut has ruled that the husband was not claiming he was terminated because he was married, but because his wife was terminated, so his marital status claim failed.

WC Claim Limits Clarified: The Connecticut Supreme Court has clarified some murky provisions of workers' compensation law, which could be read to be in conflict with respect to claims by an employee as opposed to claims by his estate after his death. The court said if an employee dies within two years of an occupational injury or the onset of an occupational disease, a claim may be filed either by the employee or his estate up to two years after the injury, or up to three years after the onset of the disease. A timely claim filed by an employee can be pursued either by his estate or his dependents after his death.

False Drug Test Result Not Actionable: When a drug testing lab released to an employer test results that incorrectly showed an employee tested positive for illegal drugs, he brought suit alleging invasion of privacy by putting the employee in a false light. A court has dismissed his claim, because he couldn't prove the lab knew the information was false, and because the information was communicated only to a single individual, not to the public at large.

Remarried Ex Doesn't Get Pension: An employee of the Town of New Canaan remarried his ex-wife only three months before his death of ALS in 2005. The spouse claimed entitlement to a survivor annuity under the municipal pension plan, but the town refused to recognize her claim, because she had not been married to the employee for at least twelve months. The deceased employee's union took the matter to arbitration, claiming the couple's first marriage should

count toward meeting the twelve month requirement contained in the pension plan. The arbitrators disagreed, saying the obvious intent of the plan was to discourage marriages that only took place to transfer benefits.

S&G Notes: Our annual **Fall Seminar** for clients and friends will be held at the Hartford Marriott on Friday, November 2, from 8:00 a.m. to noon. There is no charge, but space is limited, so reservations are suggested. Please call Sandy Swain at (860) 251-5746 for more information . . . **Paul Shapiro**, formerly an Assistant Attorney General who functioned as general counsel to the University of Connecticut, has joined our firm, and will focus his practice on the representation of public and private schools and colleges.

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