ROUTE TO: _____ _____ _____

Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

SUMMER 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.

- **Public Employee Speech:** The U.S. Supreme Court has changed the landscape of the First Amendment in the workplace. In a decision involving a deputy prosecutor who was disciplined after writing an internal memo recommending dismissal of a criminal case, the justices ruled 5 to 4 that free speech protections don't apply to statements that are made in the course of performance of an employee's duties. They said employers need to retain control over how employees do their jobs, and when a government worker writes a memo as part of his job, he is speaking as an employee, not as a citizen.
- **What Constitutes Retaliation?** In most cases where an employee claims some action has been taken against him or her in retaliation for having made a discrimination claim, the adverse action is discharge or something else that causes the employee economic damage. Recently, however, the Supreme Court ruled unanimously that prohibited retaliation can include transfer, paid suspension, or other acts that a reasonable employee would consider "materially adverse."
- **Religious Accommodation:** A federal appeals court has ruled in favor of a Home Depot employee who said he couldn't work on Sundays because of his religious beliefs. Although his employer offered him a later shift on Sundays so he could attend church services, the court said that did not satisfy the obligation to provide "reasonable accommodation." The judges may have been influenced by the fact that a previous store manager had no problem accommodating the worker's request for Sundays off.

Job Offer Withdrawn; Lawsuit to Follow

If you make an offer of employment, can you change your mind and revoke it before the employee-to-be starts work? As in so many other areas of employment law, the answer is "it depends." But in Connecticut it not only depends on the facts and circumstances of the case, it even depends on which judge you get. Two recent decisions illustrate the point.

In one, an employee of a temp agency was given an assignment at Unilever for a few months, and while working there was offered a $75,000 job with Unilever. She quit her temporary job, but when she reported for her new one she was told the offer was being rescinded because it had been determined she was not qualified for the position. She brought suit, alleging intentional misrepresentation (fraud), negligent misrepresentation and promissory estoppel.

The judge found Unilever's offer was for at-will employment, which meant the plaintiff could have been terminated for any lawful reason after she started work. While acknowledging that most decisions from other jurisdictions draw no distinction between withdrawing an offer shortly before the job commences and terminating an at-will employee shortly after he or she starts work, the judge found the two situations to be distinctly different. In one, the employer has at least fulfilled its promise to hire the individual, in the other it has not. There are also practical differences, including the fact that the employee whose offer is withdrawn before he or she starts work may not be eligible for unemployment compensation. He therefore ruled the suit against Unilever could go forward on all three grounds.

The other case came before a different judge, and produced the opposite result. An employee of ADP quit his job to accept a job offer from DSL, only to be told on the day he reported for work that the offer was being withdrawn based on the results of a reference check. It was undisputed that the offer was for at-will employment, and that there was no mention of a reference check at the time the offer was made. The rejected employee went to court, claiming breach of contract, negligent misrepresentation and infliction of emotional distress.

The judge in the DSL case took a different view from the judge in the Unilever case. He said that it was arguable that an at-will employment relationship started (and therefore could be ended) after the offer was made and accepted. In any event, he said, it didn't matter what the plaintiff's status was when he reported for work. If DSL had the right to end his employment for any reason, it could exercise that right either before or after he started the job. It's difficult to reconcile these two decisions, and until a higher court rules on this issue it may be that the outcome of future cases may simply depend on which Superior Court judge decides them.

Our advice to employers is to make the job offers in writing, to state clearly that employment is "at will" if that is what the employer intends, and to list any conditions that may apply. These might include the satisfactory outcome of a reference, background or credit check, successful completion of a drug test or pre-employment physical exam, and perhaps other requirements.

Three New Lawyers Added

Our firm's Labor and Employment Department has been enhanced by the arrival of three additions to our education practice group.

Gary Brochu is well known in education circles, having served for several years on the Berlin Board of Education, which he currently chairs. He has also been a vice president of CABE. **Rae Vann** has considerable experience in education and employment matters, including two years of service as counsel to the New Haven Board of Education. **Erin Duques** joins us from a Bridgeport firm that has an extensive employment practice, including school board clients.

Shipman & Goodwin currently represents approximately 85 local and regional school districts and related entities. The arrival of three new lawyers is timely, since our clients are involved in fully half the teacher and administrator contract negotiations scheduled to begin within the next few months.

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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.

Free Speech Claims Are All the Rage

It seems like every other employment lawsuit one sees these days includes a claim that some action taken against an employee is in retaliation for his or her exercise of the constitutional right to freedom of expression. The U.S. Supreme Court case reported on the front page of this edition is but one example. Most such lawsuits are a far cry from the landmark *Pickering* case, in which a school administrator was disciplined after speaking out in a public meeting about the level of funding of the local school system.

Many free speech claims don't get far. A U.S. District Court judge recently rejected a claim by a law enforcement officer at the Groton-New London Airport that he was fired in retaliation for making safety-related complaints, including one about the lack of Kevlar vests for officers. The judge said the officer wasn't speaking out as a citizen on a matter of public concern; his speech didn't transcend ordinary law enforcement issues.

Another District Court judge dismissed a claim by a DCF social worker who was disciplined, allegedly because she had complained about a conflict of interest on the part of her supervisor. That judge said such complaints are routine workplace matters, and do not advance a public interest.

Even if an employee can convince a judge that the subject of their speech has constitutional implications, that doesn't necessarily mean the employee prevails. He or she still has to show a causal connection between the speech and an adverse employment action. That's not always easy, especially if the employee has engaged in other conduct that the employer claims was the reason for the discipline.

Another DCF worker alleged retaliatory transfer after he complained to a supervisor about the treatment program for a youth under DCF's jurisdiction. A District Court judge said that even if such speech was found to be protected by the First Amendment, the worker couldn't prove any connection between his complaint and his transfer, which took place about two years later.

Similarly, an Enfield police officer failed to convince another District Court judge that his discharge resulted from his criticism of a superior officer's handling of a domestic violence case. The judge credited the Town's claim that the real reason for its action was that an internal affairs investigation showed he had been untruthful in a police report.

Our opinion is that decisions on these issues can be very subjective. Who is to say what is or is not a matter of public concern? How can a judge determine what the real reason for an employer's action may be? That is particularly true where, as is often the case, the employee has been a troublesome one and the employer's action is based on a series of problems that have finally led management to say "enough."

LEGAL BRIEFS
and footnotes

Strike Benefits Not Wages: The work stoppage by employees of Church Homes has spawned a lot of interesting employment litigation. The latest is a court decision affirming an unemployment compensation ruling to the effect that benefits received by strikers from their union are not wages, and therefore do not reduce any jobless benefits to which they may otherwise be entitled. Other states have reached differing conclusions on this issue. The judge in the Church Homes case relied in part on the fact that the strike payments were derived from union members' own dues.

Poison Ivy Problem: A nurse working for the City of Stamford took sick leave before and after the July 4, 2005 weekend, and presented a doctor's note stating she couldn't report to work because she had poison ivy. When the City found out she was still working at her second job, she was fired. A State Board of Mediation and Arbitration panel upheld the discharge, based in part on the fact she had previously been warned for abusing sick leave, including repeatedly using it to extend holiday, weekend or vacation time.

Medical Complications: We previously reported on a doctor's challenge of his dismissal by a private health network after he used credit card numbers of patients to phone adult entertainment numbers. An arbitrator overturned his termination, crediting his testimony to the effect that his conduct was caused by a minor mental disorder that was cured by counseling. A judge vacated the arbitration award because it violated a public policy against theft, but an appellate court reversed that decision, finding another public policy favoring rehabilitation of those who engage in criminal conduct. To complicate matters even further, while the employer's appeal to the Supreme Court was pending, the doctor's contract expired, so he moved to dismiss the appeal as moot. The high court agreed to dismiss the appeal, but in the interest of justice it also set aside the appellate decision. That left intact the lower court decision overturning the arbitration award, so the doctor couldn't sue his former employer for damages.

Video Violation: A supervisor at the Mohegan Sun casino appealed an order revoking his gaming license based on his alleged theft of $2,000 from a kiosk machine. Apparently the machine failed to pay a customer who hit a $2,000 jackpot, so the supervisor took him to a cashier window to collect his money. Thereafter, the supervisor corrected the problem with the machine, which paid him the $2,000. He claimed he returned it via a drop slot, but the money was never recovered. The Mohegan Gaming Disputes Trial Court reinstated his license when it found the casino had failed to preserve a surveillance videotape, which might have supported the supervisor's claims.

FOI Trumps DCF: Most school administrators assume that records of student abuse can be disclosed only to or through DCF, even if the abuser is a teacher. However, when the State Department of Education failed to turn over to the Stamford Advocate records of abuse by a technical school student by a teacher, the Freedom of Information Commission ruled against them. It said that Section 10-151c, which makes records of teacher misconduct available to the public, trumps DCF regulations making records of child abuse confidential. The FOIC did permit the redaction of student names and other individually identifiable information from the records.

SOX Order Reversed: We recently wrote about a whistleblower at Competitive Technologies who claimed he was fired after expressing concerns that his employer failed to disclose certain compensation payable to its executives. We reported that a federal judge issued a preliminary order enforcing a reinstatement requirement imposed by the Department of Labor. Now an appeals panel has voted, 2 to 1, to reverse that order. One judge opined the lower court had no authority to issue a "preliminary order" in Sarbanes-Oxley cases; a second judge said that even if such power existed, it shouldn't be used in this case because the Labor Department investigation violated the employer's due process rights; but the third judge disagreed with both the others on both issues. It's difficult to find any reliable guidance in a decision like that!

2015 Grievance Not Ripe: An East Haven employee retired at age 56, and was given health insurance as if he were still an active employee. However, he was told coverage would end when he was eligible for Medicare in 2015. He filed a grievance, but when the case got to arbitration the Town said it was premature. The arbitrators agreed the case was not ripe for hearing, because the Town had not violated the contract, and there was no indication it would do so for many years. Of course, if he brings the matter up again in 2015, the Town will presumably claim the matter is not arbitrable because retirees have no right to representation under a union contract.

Severance Not Wages: A Superior Court judge has ruled that promised severance pay does not constitute "wages" under Section 31-72, which authorizes double damages and attorneys fees for an employer's failure to pay wages due. However, severance benefits can be recovered under a quantum merit theory, because they represent accrued compensation for past service.

Fleet Footnote: In our last issue, we reported on a court decision striking down certain provisions of a Fleet Bank "cash balance" retirement plan, which followed an earlier decision involving an IBM plan. We said we will have to wait and see how these issues will evolve. A colleague in our employee benefits practice group offers the following comment: "There is no way to design a cash balance plan that would pass muster under the IBM or Fleet decision." In his view, the only ways to solve the problem would be through legislative or regulatory action, or reversal of those decisions by a higher judicial authority.

Now We've Seen Everything . . .

We usually report on labor and employment law decisions in Connecticut, or highlight key developments on the national scene. Occasionally, however, we come across a story that just leaves us shaking our heads.

Erratic Bathroom Breaks

A transit worker in Texas made the novel claim that he was entitled to intermittent time off under FMLA because of his need for frequent, unpredictable bathroom breaks he said were caused by a medical problem. However, a federal appeals court affirmed the denial of his claim, based on his failure to meet the "serious health condition" requirements of the Act. The court also rejected his claim that he was fired for seeking FMLA protection.

Casino Makeup Rule

A female bartender working for Harrah's in Las Vegas claimed sex discrimination because the casino required female but not male bartenders to wear makeup. A divided federal appeals court found no evidence that the policy treated women unequally, or was motivated by sex stereotypes. In two separate dissents, four judges disagreed with their brethren. One said "gender must be *irrelevant* to employment decisions," except in the case of a bona fide occupational qualification, which Harrah's did not even attempt to establish.

"Creative Necessity" Defense for Harassment

Some time ago we reported on a sexual harassment claim filed by a female writer for the TV show "Friends." She alleged that in her work environment, she was regularly subjected to vulgar language demeaning to women. We said the California Supreme Court had agreed to take up the question of whether "creative necessity" was a valid defense to such a claim. The show's producers argued that sexual banter and vulgar language were part of the creative process by which the episodes of "Friends" were developed.

The California Supreme Court has now rejected the writer's sexual harassment claim. It found that the vulgar language and sexual banter were not directed at her, nor were they because of her gender, since writers of both genders participated and the jokes were aimed at both sexes. Further, the court said no reasonable trier of fact could find the conduct in question to be so severe or pervasive as to constitute a hostile work environment, especially given the nature of the show on which the plaintiff was hired to work.

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