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Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

WINTER 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.

- **Bush Makes NLRB Appointment:** With three pending nominations to fill vacancies at the NLRB languishing in the Senate, President Bush has given one of the nominees a recess appointment that will last until 2007. He is Peter Kirsanow, a management representative who has been criticized by labor leaders and some Democrats who claim he opposes basic worker rights and affirmative action.
- **Web Hiring Rules Take Effect:** As of February 6, new OFCCP guidelines require federal contractors to maintain records on people who apply for jobs via the Internet. Information must be kept about anyone whose expression of interest shows he or she has the basic qualifications for a job for which the employer considers him or her. If the applicant doesn't indicate race or gender in the application, the employer is required to solicit that information. Some industry representatives wonder whether companies will actually go to the trouble of complying.
- **DOL Gives FLSA Advice:** The U.S. Department of Labor has issued opinion letters clarifying the rules in two areas of the wage and hour laws. First, nonexempt employees need not be paid for civic or charitable work for which they volunteer through their employer, as long as it is outside their regular hours and dissimilar from their regular work. They can also accept expense reimbursement or a small stipend, as long as it is not "a substitute for compensation." Second, employers can dock employees who fail to show up for work because of inclement weather without jeopardizing their salaried status. They can also require salaried employees to use vacation or personal time during weather-related closings, but can't dock them if they are ready and willing to work.

Retirement Reductions Lead to Litigation

In the private sector, pensions and other retirement benefits are generally governed by ERISA. Not so in the public sector, where changes in accounting requirements and budget crunches have led employers to take steps to cut benefits and otherwise limit their liability. Affected employees have sometimes resorted to the courts when union contracts and other protections fail them. Several such lawsuits have been filed in Waterbury, where the state oversight board, acting as a binding arbitration panel, has cut back generous benefits bestowed by a series of former mayors.

In one case, employees claimed that a change from a "20 and out" pension plan to a requirement of 25 years of service and age 55 couldn't be applied to them, because they became entitled to the more generous standard when they met the 10-year vesting requirement. The workers and their unions argued the change to "25 and 55" amounted to an unconstitutional taking of a benefit that had become a property right. A federal judge disagreed, ruling that the vesting provision assured a 10-year employee of a pension, but the actual benefits were to be determined when the employee retired.

An employee who sought a disability retirement met a similar fate. He suffered an injury that ultimately disabled him from doing his job. When the injury occurred, Waterbury had a liberal definition of disability for purposes of qualifying for a disability retirement benefit. However, by the time he applied for retirement, it had been changed to track the Social Security definition, which is a more stringent standard. A state court judge ruled the applicable standard was the one in effect when it was determined he couldn't return to work, not the one in effect when he was injured.

Our opinion is that a variety of factors are forcing municipalities to take a closer look at their retirement plans. Underfunded pension benefits can damage municipal credit ratings and thus increase the cost of borrowing. New rules adopted by the Government Accounting Standards Board (GASB) are focusing attention on unfunded promises to provide health insurance to retirees. Current criticism of government's tendency to adopt costly programs and let the

next generation figure out how to pay for them has made pay-as-you-go (i.e. unfunded) retirement benefits an endangered species. Most responsible employers agree that's a good thing.

State Employees Score Wins in Court Cases

Two recent victories in legal battles have given state employees reasons to celebrate. However, it may be too soon to break out the champagne.

The most dramatic win was a surprising turnaround that could put the state's pension plan in dire straits. Two assistant attorneys general complained when they retired that the vacation and longevity pay they received wasn't properly factored into their pension benefit compensation. They claimed that money should be added to their regular pay for their last year of employment in order to compute the base salary on which their pension benefit was computed. The Retirement Commission, applying its longstanding practice, disagreed.

The practice was that the vacation and longevity payments were converted into a temporal equivalent, and employees were treated as if they had worked that many more weeks or months for purposes of computing both length of service and average final compensation. If the payments were the equivalent of three months of work, for example, the effect was to eliminate the first three months of the three years over which an employee's average final compensation was computed, and substitute three months at the end.

Using that example, the plaintiffs agreed they should be credited with three months of additional service time, but also wanted to have their base salary computed as if they had received fifteen months pay for their last year of work, thereby significantly enhancing the base salary on which their pension was computed. Though the trial court rejected their claim, an Appellate Court panel reversed that ruling, and upheld their claim.

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Our opinion is that result will probably change, if only because the State can't afford it. If the Supreme Court doesn't reverse the decision, the General Assembly will likely consider a legislative fix.

The other state employee victory was in the preliminary rounds of a lawsuit challenging the 2002 layoff of about 3,000 state employees by the Rowland administration. Although the state argued the action was based on financial need, state employee unions claimed the real motive was retaliation for their political opposition to the governor. A federal judge denied the defendants' motion to dismiss the case, in part because some discovery was required before the state's "legislative immunity" defense could be assessed.

The judge did, however, rule that the unions could not seek money damages from the defendants, former governor John Rowland and his OPM Secretary Marc Ryan, since the lawsuit was really against the state and not against the two individually. That left only the possibility of an injunction against similar action in the future.

Workers Comp for Basketball Injury?

It seems like it should be simple to apply the statutory rule that workers compensation benefits are not available for "an injury to an employee that results from his voluntary participation in any activity the major purpose of which is social or recreational, including but not limited to athletic events, parties and picnics…" In theory it should be simple, but in practice it's anything but.

Take the case of an employee whose boss asked him to participate in a little "two on two" basketball game during working hours. The employee testified he felt he had to participate, and that his employer would think less of him if he refused. When he injured his Achilles tendon, he filed for workers compensation.

At the commissioner's level he collected, but the Board of Review reversed, finding insufficient evidence that the employee's participation was not voluntary. A sharply divided Appellate Court panel disagreed with the Board of Review, and reinstated the commissioner's decision. The majority concluded the Board had insufficient grounds for rejecting the commissioner's conclusions, citing the fact that the basketball game was on company time, on work property, and at the behest of the owners, who wanted to improve employee morale.

The dissenting judge said the majority ignored the fact that a recreational injury is not compensable if participation in the game is voluntary, even if it takes place on work time in a work area. He noted the Board of Review found no evidence the employee was pressured into playing, and concluded that his subjective *feeling* that his employer would

disapprove if he didn't play was not enough to make his participation involuntary.

Our opinion is that an employee's feeling is too weak a basis for deciding whether he is entitled to benefits. The majority decision in the basketball case creates the same problem as an award of unemployment compensation to someone who voluntarily leaves work because she feels her supervisor doesn't like her and wants her to quit. In both situations, the employee can say whatever he or she wants to say about his or her state of mind, and it's almost impossible for the employer to refute it.

State Lawmakers Get Employment Protection

Most employers know they can't discharge or discriminate against an employee who is elected to the state legislature, but what exactly does that mean in terms of wages and other working conditions? Two recent decisions offer some answers.

LEGAL BRIEFS
and footnotes

Inmate to Mate: A counselor at the Department of Corrections was fired after she married an inmate who was on parole. Although she had an excellent work record, an arbitrator declined to reinstate her because she was less than truthful about whether she lived with her husband and she failed to report the relationship as required. The arbitrator found the DOC rules against fraternization with inmates are necessary for safe, efficient operation of prisons.

N-Word Slip-Up: A New Haven firefighter who was asked to introduce a speaker intended to reference the United Negro College Fund, but instead mistakenly used the other n-word. Although she had no history of discipline or racist comments, she was suspended for six months. A panel of arbitrators overturned the discipline, and the City went to court, claiming the arbitrators departed from the terms of the contract by reading into it a requirement that disrespectful language must be intentional to justify a penalty. The judge disagreed, and found the award did not violate public policy.

Cell Phones Not Private: A newspaper reporter made an FOI request for cell phone numbers of school administrators in Hartford, but was turned down on the grounds the information was confidential or a trade secret. The Freedom of Information Commission rejected both claims, noting that the phones were owned by the school system. Although it ordered the release of the requested information, the FOIC declined to assess a penalty.

Lieutenants' Longevity: The state provides certain benefits to its non-bargaining employees that it doesn't give to unionized workers. One of those is an enhanced longevity benefit. When lieutenants in the Department of Corrections were given the opportunity to unionize, they did so, and the state took away their special benefits. The state Board of Labor Relations ruled the state had to restore the benefits. The decision to join a union did not justify a unilateral change in a benefit that is a mandatory subject of bargaining.

SSN Must be Disclosed: The federal appeals court with jurisdiction over Connecticut has rejected an appeal by an employee who was fired for failing to disclose her Social Security number. The court dismissed her claim that disclosing her SSN put her "in dire jeopardy of having her identity stolen." After all, her employer was simply trying to fulfill its legal responsibilities.

Public Policy Expanded: An employee of a financial service company was fired after complaining about interference by the marketing department in the underwriting process. She sued, claiming a violation of Section 31-51q, Connecticut's free speech law. Normally the law only applies when the employee's speech involves a matter of public concern. The judge in this case, however, denied the employer's motion to dismiss, and accepted the plaintiff's argument that the matter could be of concern to the company's stockholders. In publicly held companies, this decision may create many opportunities for claims that employee complaints involve matters of public concern.

No H&H for Constables: Connecticut's heart and hypertension law provides benefits to "regular member[s] of a paid municipal police department." But what about a constable who works under the supervision of a state trooper? In a case involving an East Lyme constable who suffered a heart attack, the Connecticut Supreme Court has ruled against benefit coverage. A municipal police department must be under the operational control of a police chief, board of police commissioners, or similar municipal organizational structure.

Teacher Denied UC Benefits: A former Tolland Green Learning Center teacher has been denied unemployment benefits because her base period employment was with a church that had not elected to participate in the unemployment compensation system. Although she argued she was an employee of the school, not the church, the administrator found the two entities were not separately incorporated, and the teacher's paychecks came from the church.

S&G Notes: The newest partner in our Labor and Employment Department is **Lisa Banatoski Mehta** . . . Our firm's annual spring seminar for public sector employers will be held on May 11 at the Rocky Hill Marriottn.

James Fleming worked for Asea Brown Boveri (ABB) in 1994, when he was elected to the state Senate. Shortly thereafter, he got a promotion but no raise. The HR department told him that his salary as a legislator, when added to his ABB salary, was comparable to what other employees at his level were making.

However, a court recently ruled that while it was permissible to prorate Fleming's salary based on the percentage of his normal working hours he spent on legislative duties, it was not permissible to discount his pay by his earnings as a legislator. He was owed several years of back pay.

Kevin Witkos, a member of the general assembly as well as a municipal police officer, asked for an opinion as to how much accommodation his employer had to offer him, and specifically whether he could select work shifts so as not to interfere with his legislative duties. According to an advice letter from the Attorney General, the police department is required to allow the officer to select his shifts, without regard to the seniority provisions in his union contract, so he can be a full time police officer as well as a state legislator.

Our opinion is that while it is desirable to make some accommodations so people who are not independently wealthy can run for the legislature, it is not unreasonable to question how much of that burden should fall on employers and co-workers.

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Orchestra Musicians Can't Unionize

When the American Federation of Musicians tried to unionize the Waterbury Symphony Orchestra, they ran into a problem. The State Board of Labor Relations ruled, 2 to 1, that the musicians were not employees, but rather independent contractors, and therefore were not subject of the jurisdiction of the Board.

Applying the "economic realities" test, the majority concluded the musicians do not depend on the $18.60 per hour they are paid by the symphony for regular wages, they may invite friends to attend performances for only $5, and they are not penalized when they miss a rehearsal or a performance. Therefore, they do not have the "subservient, dependent relationship" normally associated with the employee status.

The dissenting member pointed out the musicians have no voice in what they are paid, no control over when they work or what they play, no say in the number and length of rehearsals, and no input on their other conditions of employment. She also noted many of them have been working for the symphony for 20 years or more.