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Employment Law Letter

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Labor & Employment Law Department

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Damages For Discrimination Often Disputed

If an employee is terminated and successfully argues it was the result of illegal discrimination, everyone knows the employer may be on the hook for lost wages and other out-of-pocket expenses. But what about compensatory damages for emotional distress? Are punitive damages and attorneys' fees possible as well? The answer is, it depends.

Most employment discrimination claims in Connecticut start out at the Commission on Human Rights and Opportunities. Although the Connecticut Supreme Court ruled years ago that the applicable statutes don't allow the CHRO to award compensatory damages or attorneys' fees, the agency has argued otherwise in some circumstances. In any event, if the same claim ends up in court, the rules change, and judges have the right to award other forms of relief, including compensatory damages and attorneys' fees.

The same is true under federal laws on employment discrimination, such as Title VII of the Civil Rights Act, the ADA and the ADEA, although there are special provisions in some of these laws such as damage caps that vary depending on the size of the employer, and double damages for age discrimination. A federal lawsuit can be more complicated and expensive to defend than a state court case, and may mean greater exposure for the employer when it comes to damages.

But what about punitive damages? A recent case brought in state court in New London by a UPS driver may answer that question, at least under Connecticut law. The driver was terminated after he suffered a back injury, didn't get the accommodation he wanted, got into an argument with his boss over the issue, and declined to take a drug test that was ordered because the employer thought he was engaging in irrational behavior. He sued for disability discrimination, violation of Connecticut's drug testing law, and negligent infliction of emotional distress.

A jury found in favor of the driver on all counts, and awarded him $500,000 in compensatory damages plus another

$500,000 in punitive damages, on top of $47,000 in back pay and $167,000 in attorneys' fees. The judge struck down the punitive damages, although that decision will likely be appealed because the availability of such relief under Connecticut's employment discrimination law has not been decided by our Supreme Court. The award of attorneys' fees may also be disputed.

Our advice to employers, not surprisingly, is to avoid if possible situations where there is exposure to this uncertainty. When facing an employment discrimination charge, assess early on the potential liability, and seriously consider whether it makes sense to spend a relatively modest amount to settle the matter rather then risk the costs and potential damages associated with a winner-take-all battle.

Computer Wars: Revenge of the Workers

Employers have always had concerns about disgruntled workers lashing out because of a job-related action they don't like, especially discipline or discharge. Risks range from trashing an office to damaging equipment to assaulting co-workers or supervisors. These days, with more employers becoming more dependent on computers, and more employees becoming tech-savvy enough to do real damage with a few keystrokes, a fast-growing concern is cyber sabotage.

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Some employers preparing to fire workers make arrangements to have computer access shut off even as the employee gets the bad news. However, that isn't always possible. For example, when trustees dismissed the Head of Whitby School, a Montessori school in Greenwich, she allegedly retaliated by accessing the school's email server and deleting over 1000 messages from the email accounts of other employees, and deleting data and software from computers she used before returning them. The school sued.

A federal judge said the school had rights under both state and federal laws. For example, the Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computer information of a business involved in interstate or foreign commerce, which includes most companies with more than a handful of employees. While damages are only available in cases of physical injury or loss of more than $5,000, the cost of diagnosing the problem and fixing it can easily exceed that amount.

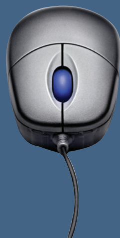
Another federal law, the Electronic Communications Privacy Act (ECPA), authorizes claims against anyone who without authorization accesses a facility providing electronic communication and thereby accesses, alters, deletes or prevents access to other people's stored communication. The deletion of one's own email messages is not prohibited by this statute, however.

Connecticut has a law of its own on this subject, and it is somewhat broader in scope. It establishes a cause of action for unauthorized access to a computer system, theft or interruption of computer services, misuse of computer information or destruction of computer equipment. This statute, C.G.S. Section 52-570b, allows for recovery of actual damages, and return of any unjust enrichment of the perpetrator. There are also common law principles that may apply in Connecticut.

Our opinion is that it's better to avoid the problem in the first place than to try to remedy it after the fact. In cases where blocking access to computers isn't feasible, it may make sense to warn employees that any cyber-misconduct will be dealt with severely and to the full extent of the law.

Recent S&G Website Alerts

New Regulations Interpreting the Genetic Information Non-Discrimination Act Become Effective January 9, 01/11



Heart and Hypertension Claim Rules Clarified

One of the benefits unique to municipal police officers and firefighters, at least in Connecticut, is treatment of heart disease and hypertension as if they were job-related illnesses or injuries that qualify for workers compensation payments. Surprisingly, however, there has never been a definitive decision on the time limit for bringing such claims. Until now, that is.

In a case involving the Town of Hamden, our Supreme Court has ruled that heart disease and hypertension are not like repetitive trauma injuries, where the one year statute of limitations renews with each new exposure to the condition that causes a problem, but must be treated as an accidental injury that can be identified in time and place. However, the one year does not start to run when the employee first has a high blood pressure reading or other problematic symptom, but rather when he or she is diagnosed as having the condition.

This result is inconsistent with some lower court decisions in the past. However, it is better than it might have been for municipal employers. One justice filed an opinion concurring in the result, but arguing that heart and hypertension issues should be treated like repetitive trauma injuries, which would mean a claim could be filed at any time up to a year after termination.

Legal Briefs
and footnotes...

NLRB Flexes its Muscles: In our last issue, we reported on the expansive reading of the phrase "concerted protected activity" by the NLRB's Hartford regional office ("Badmouthing the Boss on Facebook"). Now the Board itself is taking an aggressive posture. First it issued proposed regulations requiring employers to post notices advising employees of their right to unionize, which is similar to the requirement already imposed on federal contractors. Then the Board's General Counsel wrote to the attorneys general of four states threatening to sue over the adoption of amendments to their state constitutions prohibiting employees from unionizing via a card check or other voluntary recognition, as opposed to a secret ballot election. Observers are asking what's next?

Fed Ex Drivers and Exotic Dancers: The latest developments in the ongoing series of lawsuits over misclassification of independent contractors illustrate the wide range of jobs that can be in dispute. A federal court in Indiana overseeing nationwide litigation over claims that Fed Ex improperly classifies its delivery drivers as independent contractors has ruled that the plaintiffs have failed to establish employee status in many of the states involved in the lawsuits, but related cases in Connecticut are still ongoing. Meanwhile, claims have been filed in Connecticut and Massachusetts alleging that "gentlemen's clubs" in those states wrongly classify exotic dancers as independent contractors in order to avoid paying them even minimum wage. In fact, some of the women allegedly pay $35 to appear on the stage because they expect to make more than that in tips. The clubs have claimed, without success to date, that dancers are not employees because they are not associated with their "core" business, which is selling liquor.

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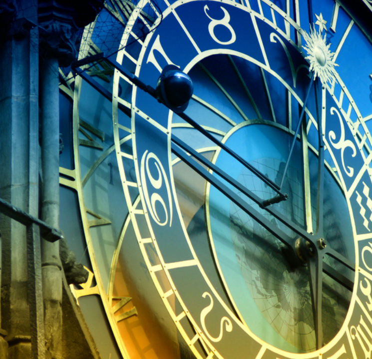

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Arbitration and Public Policy: Attempts to overturn arbitration awards based on alleged conflicts with public policy are becoming more common, and often more successful. A Connecticut Appellate Court refused to uphold an arbitration award reinstating a correctional officer who engaged in a pattern of flagrant sexual harassment of co-workers, even though the arbitrator imposed a one year suspension without pay. The court held the award violated public policy because it placed a sexual harasser back into the workplace. Even unions are attacking awards on the same theory, but so far without much success. Another Appellate Court panel refused to overturn an award of back pay but no reinstatement for a Westbrook Constable who used the n-word in referring to his co-workers. The union argued that if the grievant deserved back pay, he deserved reinstatement, but the judges disagreed.

What Constitutes Willful Misconduct? At least some unemployment compensation officials apparently are coming around to the view that with so many people looking for work, employers shouldn't have to put up with employees who are obnoxious and abusive. Although he persuaded lower level administrators not to disqualify him from jobless benefits, a Bozzuto's employee was found guilty of willful misconduct by the Board of Review when he was fired after a voicemail message in which he called his box a "piece of sh--" and ended by saying "fu-- Bozzuto's." Although the initial decision excuses the claimant for a "heat of the moment" response to a three-day suspension, the Board disagreed because he called back and left his voicemail tirade 30 minutes after leaving work. A Superior Court judge recently denied the claimant's appeal.

No Personnel File Violation: Employment lawyers have generally assumed that Connecticut's law restricting disclosure to third parties of information in employee personnel files without authorization covered not just documents in such files, but also the information contained in those documents. At least one Superior Court judge has ruled otherwise. Just before an assisted living facility terminated an employee, it informed other employees and the family of a resident that she had been suspended. The employee sued, alleging a violation of the Personnel Files Act. The judge noted that the definition of personnel files included "papers, documents and reports," and nothing fitting that description was disclosed. However, he refused to dismiss a claim for "infliction of emotional distress" based on the communication with a resident's family.

S&G Notes

Our annual Spring Seminar for our public sector clients is scheduled for March 4 at the Rocky Hill Marriott.

We also have 3 upcoming sessions for Sexual Harassment Prevention Training, in Hartford on April 12th and April 28th and in Stamford on April 14th.

We will be sending out invitations in the near future, so please mark your calendars and plan to join us.