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Labor & Employment Practice Group

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Attorneys' Fees Can Dwarf Damages In Bias Cases

When assessing the risks associated with defending employment lawsuits, don't forget to factor in the possibility of an award of substantial attorneys' fees if you lose the case. A December decision in a Walmart case illustrates the point.

An African-American employee in Walmart's Waterford office complained of discrimination when he was laid off in a 2010 downsizing, and was thereafter rejected for more than a dozen similar openings, which he claimed constituted retaliation for his complaint of discrimination. Earlier in 2017, a jury rejected his discrimination claim but found in his favor on his retaliation claim. They awarded him \$5.5 million in damages, an amount that was cut to \$300,000, which is the maximum allowable under Title VII of the Civil Rights Act.

In the December decision, a federal judge awarded approximately \$1 million in attorneys' fees and costs, rejecting Walmart's claims that the employee's lawyer had run up excessive charges related to issues on which she did not prevail. The court held that given the lawyer's "skill,

experience and relative success" in the jury trial, her hourly rate of \$500 was not unreasonable.

Attorneys' fees are not available in all employment cases, but when they are, they can add up to multiples of the employee's economic damages, such as lost wages and benefits. In the Walmart case, they were over three times the maximum damages payable to the employee.

Our opinion is that employers should consider a variety of factors when deciding whether to fight a case or settle, including the risk that even a modest settlement could encourage other employees to bring similar claims. However, while employers usually include the cost of their own legal defense in the equation, they shouldn't forget to include the potential cost of the plaintiff's counsel if the case doesn't go their way.

FLSA Settlements Must Follow Rules

In a span of just two short weeks late last year, three decisions by federal judges in

Connecticut provided important lessons on the terms and conditions necessary to settle wage and hour cases brought under the Fair Labor Standards Act.

In the first ruling, the judge rejected a proposal submitted by the parties, after engaging in mediation, to settle a case privately without recording the settlement on the public docket. Citing other decisions by judges in Connecticut and neighboring states, he said that because the FLSA requires approval of settlements by the court, there was a strong presumption in favor of public access to the terms, notwithstanding the preference of the parties.

Two weeks later, after the parties had filed their settlement agreement, the same judge refused to approve it, citing three reasons. One, the agreement contained a release clause that went beyond the claims that were asserted

in the suit. Two, it included a confidentiality agreement that prevented the plaintiff from discussing the settlement, which violated the principle discussed in his previous ruling. Three, the agreement failed to detail the employee's alleged damages, which meant the judge had no way of determining whether the settlement amount was reasonable under the circumstances.

In the week between those two rulings, another federal judge refused to approve a settlement between a Fairfield home care agency and a live-in caregiver, who it had impermissibly paid on a per diem basis rather than an hourly rate. Once again, the judge's reason was that the agreement contained provisions regarding release of claims that were broader than the allegations in the lawsuit, and a class action waiver broader than that permitted by precedent.

Our advice is to consider settlement of employment-related

claims as early in the process as possible, preferably at the administrative level before a lawsuit is filed. Nothing prohibits out-of-court settlement of any employment disputes, including wage and hour claims. However, once a dispute governed by the FLSA becomes a formal lawsuit, it becomes harder to resolve the matter confidentially, or in a manner that prevents the plaintiff from bringing other claims against the same employer.

What is Comparable Insurance Coverage?

Collective bargaining agreements covering public employees in Connecticut often provide for health insurance for retirees. In some cases, those contract provisions say retirees shall be covered by the same plans as active employees, but others say retirees will get coverage that is the same as, or comparable to, the plan in effect at the time they retired.

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Given how quickly the world of health insurance has evolved recently, any knowledgeable employer would avoid committing to the “same” coverage for an indefinite period of time, but what is meant by the term “comparable”? What if the terms of the plan are the same, but the carrier is different so the network of participating providers or approved drugs is different? What if co-pays are lowered for preventive care, but are increased for some other medical services?

The latter scenario was presented to a panel of Appellate Court judges in a case brought by a group of retirees from the Town of Bloomfield. They rejected the plaintiffs’ claims, finding that the term “comparable” did not mean identical. While it was true some co-payment requirements had been increased, others (such as preventive care and routine eye examinations), were reduced to zero.

In a related development, a Superior Court judge recently rejected a request for an injunction brought by a group of police and fire retirees in Torrington when the municipality adopted an insurance plan with new deductible requirements. They claimed the change violated a promise they would not have to pay more for coverage than they did at the

time of their retirement. Without deciding the merits of their claim, the judge said they were not entitled to an injunction because the change did not constitute “irreparable injury.” In other words, if they ultimately win their case, money damages will make them whole.

Our opinion is that any contractual health insurance provision that restricts an employer’s right to make reasonable changes in retiree cost or coverage is problematic. This is especially true in the public sector, where employees often retire with future life expectancies of up to 40 years or more. What is the justification for providing retirees with a better health insurance plan or a lower cost than they would have enjoyed if they had kept working? Of course, some

such provisions may have been imposed by binding arbitration panels under Connecticut’s public sector bargaining laws, but that doesn’t mean they are reasonable or justifiable given the economic circumstances that public employers are facing today.

Now We’ve Seen Everything...

This story caught our eye. A woman was riding her bike along her usual route when President Trump’s motorcade passed by on his way back from a golf outing. Presumably expressing her personal opinion about the current occupant of the Oval Office, she repeatedly gave a middle finger “salute”. Her gesture was caught by a White House photographer, and the photo went viral on social media.



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Some who saw it were amused, but that apparently did not include the woman's employer. Akima LLC is a federal government contractor, and was concerned that the incident might result in lost business. They fired the woman, claiming she violated their social media policy by using the picture as her profile picture on Facebook. She pointed out that male employees had posted similarly lewd material on social media and had not been disciplined.

The press report does not say whether the woman plans to take legal action, but it's not hard to imagine a long line of plaintiff's lawyers eager to take her case. One wonders how such a lawsuit might turn out in a state like Connecticut, which has a statute (Section 31-51q) that prohibits employers from disciplining or discharging employees because of the exercise of their first amendment rights.

Our opinion is that the outcome of a lawsuit, if there is one, might turn on the fact that the employee was terminated not for the middle finger gesture itself, but for the fact that she seized on a photo taken by someone else to advertise her lewd action on social media. However, if it is to have a reasonable chance of prevailing on that theory, Akima will have to overcome the woman's claim that male employees have not been penalized for similar offenses.

Legal Briefs and Footnotes

Intern test simplified: The U.S. Department of Labor has abandoned its

complicated six-factor test for determining whether an intern qualifies for employee status, and has adopted an "economic reality" standard that focuses on which party is the primary beneficiary of the relationship. That standard was initially developed in 2015 by the federal appeals court with jurisdiction over Connecticut. Employers that have shied away from internships in order to avoid claims that they really are employees may want to revisit the issue.

Ministerial exception applied: One manifestation of the separation between church and state in our country is the immunity of churches from certain employment-related litigation. The Archdiocese of Hartford recently dodged a discrimination lawsuit by an employee whose position the court found to be ministerial in nature. Although he was an administrative assistant, he also held the title of "sacristan" which the judge said was inherently religious. He rejected the employee's argument that the two positions should be considered separately, and that he should at least be able to pursue his discrimination claim with respect to his administrative assistant function.

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