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Employment Law Letter

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Labor & Employment Practice Group

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Be Careful What You Say About Terminated Employees

More than once we have commented on the prevalence of retaliation claims filed by disgruntled employees or ex-employees who argue that some adverse employment action was taken against them because they exercised some legally protected right. Lately, we've noticed a similar increase in defamation claims by terminated employees, and it looks like they may become the next employment litigation fad.

Say, for example, someone is fired for theft and is so informed in a termination letter. A knowledgeable employer would never repeat that accusation to third parties, because such disclosure would be prohibited by Connecticut's Personnel Files Act. But disclosure to supervisors and managers within the employer's four walls would be no problem, right?

Wrong. Connecticut courts have said that, while those whose job involves disciplinary matters may be privy to such information, disclosure to other managers or non-managers may constitute "publication" for purposes of applying the legal principles of defamation. An employer who is sued under such circumstances may have to prove in court that a theft actually occurred in order to avoid liability. Lawyers representing terminated employees are therefore increasingly likely to throw in a defamation claim just to up the ante in a lawsuit over the discharge.

Further, the reason for the termination doesn't have to be one that involves moral turpitude. Courts have allowed defamation claims to proceed in cases where the employee has only been accused of incompetence, or violation of employer policies.

However, there is one arena in which such disclosure is permitted, even if the reason for a discharge turns out to be unproven, and that's in the unemployment compensation process. From the lowest level administrator to the highest court, an employer's statements about why an employee was fired have been held to be absolutely privileged.

In one recent case, a nurse was terminated after falling asleep on the job, which the employer said violated its policies and indicated professional incompetence. A defamation claim against the employer was dismissed, based in part on an earlier Supreme Court case where an employer filed an unemployment compensation form stating the employee was fired "mainly for fraud and lying." Many years ago, an employee was similarly unsuccessful in a defamation claim based on his employer's

statement to an employment security administrator that the employee had been fired for "drinking and drugging on the job, and urinating in the plant."

Our advice to employers is that only those in your organization with a need to know should be informed of the reason(s) for an employee dismissal. While the personnel file should reflect the reason, which should be consistent with what the employee has been told, there's no legal requirement of a termination letter, and if one is issued, its contents should not be disclosed more widely than necessary. The only exception would be a reduction in force or other no-fault dismissal where the action does not reflect negatively on the employee.

Bullying by Teacher Equals Child Abuse

There's a lot of attention these days on bullying in our schools, but we generally think of the perpetrators as being fellow students. Our Supreme Court, however, just issued an interesting decision about a New Haven teacher who was placed on the DCF child abuse registry because he engaged in similar behavior toward one of his sixth grade students.

The boy was apparently obese, because the teacher reportedly referred to him as "cheeks," a "birthing mother," and a "fish out of water." He also repeatedly pinched his cheeks, which was painful because the boy had metal braces, and threatened him with punishment if he asked too many questions in class. As a result of this alleged emotional abuse, the child became afraid of school, his grades suffered, and he wet his bed due to anxiety.

The teacher appealed DCF's decision to place him on the child abuse registry. The trial court upheld the DCF action, an appellate panel reversed that judgment, but now the Supreme Court has reinstated the trial court (and DCF's) decision. In addition to various factual differences, the courts disagreed on whether the term "emotional maltreatment" is unconstitutionally vague as applied to a teacher, and whether the use of that phrase would put a reasonable teacher on notice that the conduct at issue in this case was prohibited. The Supreme Court thought it was significant that if a fellow student had engaged in the same behavior, it would have violated Connecticut's anti-bullying statute.

An interesting footnote is that DCF initially declined to investigate the matter, but the New Haven Board of Education conducted its own investigation and decided an eight-day suspension without pay and transfer to another school was the appropriate response. The teacher's argument that the courts should defer to the judgment of educational professionals did not persuade the justices. Another footnote: he doesn't teach in New Haven anymore.

You Won't "Like" This. . .

A few years ago, the NLRB broke new ground right here in Connecticut when it issued a complaint against American Medical Response after the ambulance company fired an employee who badmouthed her boss on Facebook. AMR settled the case. Now the NLRB has done it again by finding the Triple Play Sports Bar and Grille in Watertown committed an unfair labor practice by firing an employee who merely clicked on the "like" feature after reading on Facebook an exchange between co-workers about management's alleged mishandling of payroll taxes.

According to the Board, the employee was engaged in protected concerted activity by expressing his view about a matter involving his wages, hours, or other terms and conditions of employment. Although Triple Play argued that the online discussion was unprotected because it was disloyal and disparaging, the Board ruled it was not so extreme as to forfeit the protection of the National Labor Relations Act. A

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Board majority also found the employer's policy prohibiting "inappropriate discussions about the company" was too broad and vague to be lawful.

This is just the latest in a line of cases in which the NLRB has found that an employer whose employees are not unionized has nevertheless violated the Act by disciplining or discharging employees who complain to each other or to third parties about their working conditions, or by maintaining policies that employees might reasonably interpret as prohibiting such complaints. However, finding legally protected activity in simply clicking on "like" sets a new standard for NLRB activism.

The Triple Play case is also significant in part because the Board seems to adopt a new standard for cases involving social media. Up to now, the Board has looked to the 1979 Atlantic Steel case, in which an employee mouthed off to his supervisor, but the Board said that framework didn't apply to communications outside the workplace where no supervisors or managers are involved. Instead, in the Triple Play case they focused on whether the employee discussions had damaged the company in any way, for example, by disparaging its products to the public, and whether the employee statements were maliciously false. Obviously, these factors may be difficult for an employer to prove.

Our advice is not to give the NLRB an opportunity to use your employment decisions as a basis for further expanding their reach into the non-union workplace. Before firing a disgruntled employee for something said to co-workers or even third parties about working conditions, get some input from your labor lawyer. The same advice may well be applicable to public employers who are not under the jurisdiction of the NLRB. The State Board of Labor Relations, which now includes a union lawyer, has a long tradition of following the NLRB's lead.

Legal Briefs *and Footnotes*

Things Got Worse for GE: There's an old saying, "Cheer up, things could get worse, so I cheered up and sure enough things got worse!" That happened to GE recently. In a story this spring about how employment lawsuits can cost an employer a lot more than lost wages, we used as an example a $2.5 million judgment against GE in an age discrimination case, consisting of $1 million in lost wages, an equal amount for liquidated damages, and $500,000 for emotional distress. Now a magistrate judge in Connecticut has not only upheld that award, but has tacked on almost $1 million in attorney's fees and over $200,000 to compensate the plaintiff for the additional tax liability incurred because he collected his lost wages all at once rather than over time. As we said this spring, "lost wages are just the beginning!"

No Punitive Damages Under CFEPA? Although the issue has never been addressed by a higher level court, some trial court judges have ruled that punitive damages are not available under Connecticut's Fair Employment Practices Act. Two such decisions came down this summer, including one that said if the legislature had intended to allow punitive damages, it could have said so explicitly. If other judges agree, this could be a rare piece of good

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news for employers. While the likelihood of an award of punitive damages in most cases is not great, the potential for such an award would increase employee leverage in settlement discussions, or in mediation with the CHRO.

Regional Director Appointment Confirmed: In our last issue, we speculated about whether the NLRB's designation of Jonathan Kreisberg as director of its Boston region (which now includes Connecticut) might be called into question by the U.S. Supreme Court's Noel Canning decision, which invalidated the "recess appointments" of certain Board members. Now several Board actions, including Kreisberg's appointment, have been reconfirmed by a lawfully constituted Board.

Cut in Hours Isn't Termination: When a tenured full time teacher in Regional School District 16 was informed she was being reduced to half time because of budget reductions, she went to court arguing that she was entitled to notice and the opportunity for a hearing under the Connecticut Teacher Tenure Act. A federal appeals court recently ruled that because she was not actually terminated from a teaching position, she was not entitled to the law's pre-termination procedures. Many years ago the courts reached the same result when an administrator's position was eliminated and he was given a teaching position instead.

How Do You Count to 180? Under Connecticut's Fair Employment Practices Act, an employment discrimination claim must be filed with the CHRO "within 180 days" of the alleged act of discrimination. A creative employer, Trinity Hill Care Center, tried to argue that means before the 180th day, or alternatively counting the date of the allegedly discriminatory act as day one. A court recently ruled that the day after the act should be counted as day one, and a claim must be filed by the end of day 180. Therefore a claim filed against Trinity Hill on the 180th day was timely.

Arbitrators Tough on Guns: Maybe it's true that Connecticut is less tolerant of guns than other states. In the last month alone there have been two reported cases where labor arbitrators have upheld employee discharges for gun-related offenses. When a corrections officer brought a loaded personal weapon onto state property in the trunk of her car, her dismissal was upheld in arbitration even though she claimed she had done so inadvertently because she had forgotten that the gun was there. A Bridgeport in-school suspension officer was fired after he pled guilty to breach of the peace, threatening, and possession of a weapon in a motor vehicle following an off-duty incident. Even though his offenses only constituted an "infraction" (creating a public disturbance) and not a crime, a panel of arbitrators upheld the discharge because of the violent nature of the incident and the employee's position as a role model for students.

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Labor and Employment Fall Seminar
Friday, October 31, 2014
8:00 AM - 12:00 Noon
Hartford Marriott Downtown

Please join us for our annual fall seminar for an interesting and informative program regarding recent developments in labor and employment law.

Sexual Harassment Prevention Training
Training sessions will be held in our offices as indicated below. Hartford sessions are 8:00 - 10:00 AM and Stamford sessions are 1:30 PM - 3:30 PM.

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