Employment Law Letter

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EMPLOYER LIABILITY FOR SUPERVISOR BIAS AWAITS CLARIFICATION OF "CAT'S PAW" THEORY

It has long been established law that an employer can be liable for damages incurred by an employee who suffers some adverse action at the hands of a supervisor or manager who is motivated by bias or animus based on the employee's race, sex, religion, etc. However, what if the decision-maker has no discriminatory motivation and acts on what he or she believes are objective considerations, such as periodic performance reviews, and those reviews are tainted by supervisory bias?

IN SUMMARY:

Courts in various parts of the country have considered this question, and have generally been willing to find in favor of the employee, at least under certain circumstances. The problem is, different courts have established different standards for the employee to prevail. In some cases, the court has ruled for the employee simply because a biased report ultimately affected the employer's decision. In others, the court has required a showing that the biased supervisor had a more direct role in the decision. Some have advocated a middle ground where the employer can avoid liability if the ultimate decision-maker exercises some due diligence to be sure the input on which he or she relies is reliable.

This second-hand discrimination scenario is sometimes called the "cat's paw" theory, after the fable in which a cunning monkey persuades a cat to pull roasting chestnuts out of a fire. While the cat nurses a burned paw, the monkey absconds with the chestnuts. In the employment context, a supervisor submits a biased report, based on which another manager unwittingly does his dirty work for him. The term "rubber stamp" is also used to describe this theory of liability.

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For a time, it looked like the U.S. Supreme Court would clarify the issue, when it agreed to hear in late April an appeal by a Coca-Cola bottling company from a finding of discrimination because a black employee was fired based on a report of an incident filed by a Hispanic supervisor allegedly biased against blacks. However, the employer withdrew its appeal shortly before the case was to be argued. There are other cases on the high court's docket that present similar issues, so it may be that more light will be shed on this topic in the next year or two.

Our advice to employers has always been to have in place a system of checks and balances so that adverse employment actions are not taken without some effort to be sure the information on which it is based is reliable. This is particularly true in situations where subjective judgments (such as supervisory performance appraisals) are involved.

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FREE SPEECH ON MATTERS OF PUBLIC CONCERN: DOES GARCETTI APPLY TO THE PRIVATE SECTOR?

Last year the U.S. Supreme Court decided, in Garcetti v. Ceballos, that a public employee can't claim free speech protection against discipline for making statements on matters of public concern, if the statements are made in the course of carrying out the employee's duties. The court's logic was that government shouldn't be constrained in the supervision and evaluation of the job performance of its employees.

Two recent Connecticut cases raise interesting questions about whether Garcetti applies when the employer is not a governmental entity. In one, the director of health information management at Windham Hospital was terminated, allegedly because she complained to her superiors that people in her department were being pressured to "code to bill," an illegal practice in which billing codes are changed to increase charges. In the other case, a lawyer working for a private non-profit agency that provided legal services to mentally disabled clients claimed she was fired for questioning whether her employer failed to adequately represent clients with claims against the state, because the state provided funding for the agency.

In both cases the employees sued, alleging violations of Section 31-51q, the Connecticut law prohibiting discipline or discharge of employees for exercising free speech rights. In both cases the employers cited Garcetti, and pointed out that the employees' statements were directly related to their job duties. However, the judges in both cases said Garcetti

doesn't apply where the employer is a private entity, and refused to dismiss the lawsuits.

Our opinion is that there is no good reason to treat public and private sector employees differently when it comes to issues like this. This is particularly true in fields like health care and social services, where public and private sector workers may be doing identical jobs in similar settings. Should professors at the University of Connecticut and the University of Hartford have different free speech rights and responsibilities? We suspect the judges in the two cases described above simply didn't like the Garcetti result, and therefore found an excuse not to follow it.

NLRB TO ADDRESS EMPLOYER PROHIBITIONS AGAINST EMAIL USE FOR UNION ACTIVITY

The National Labor Relations Board has consistently taken the position that employers can't selectively prohibit the use of their facilities for union organizing activity. For example, if a company allows its bulletin boards and internal mailboxes to be used for personal announcements or charitable solicitations, it can't prohibit their use for union literature. The same is true of email. If employees can shop online, share jokes and engage in other personal activities on the employer's computer system, they can't be prevented from sending union-related messages.

But can a company effectively stop union organizing online by adopting and strictly enforcing a rule against all personal use of its email system? That is a question the Board is mulling over now, having taking the unusual step of requesting oral argument on the issue. Not surprisingly, industry and labor groups took opposite positions.

For employers, the question is simple: whose property is the computer system? Since most companies spend thousands and even millions of dollars installing, maintaining and protecting their IT systems, they feel they should be able to set the rules on how they are used. Union advocates, however, argue that in today's world email is the functional equivalent of yesterday's water cooler; it's how employees talk with each other.

Some people believe the outcome of this dispute depends on a deceptively subtle distinction. Is email more akin to distribution of literature, which employers have always been permitted to regulate, or to personal solicitation, which generally can't be restricted unless it interrupts the work of the solicitor or solicitee? While advocates usually see this as a black and white question (but disagree on which is which), the truth is there are good arguments on both sides, and whichever way the NLRB rules, the issue is likely to end up in court.

Our opinion is that email restrictions are almost impossible to enforce. Email is not a particularly good organizing tool, anyway, because the employer can always find out who is saying what, and to whom. However, with union membership at the lowest point since the middle of the last century, organizers need every tool they can get. Therefore, the NLRB's decision on the email issue will be closely watched, if only for its psychological value.

LABOR ARBITRATION AND PUBLIC POLICY: EVEN JUDGES CAN'T AGREE...

In our last issue we reported on three cases where labor arbitrators had issued awards that were set aside by courts on the grounds that they conflicted with important public policies, or infringed on the rights of a governmental employer. Two more recent decisions demonstrate that judges not only can disagree with arbitrators over whether a particular outcome (such as reinstatement of an employee fired for engaging in some sort of criminal conduct) conflicts with an important public policy; all too often they can disagree with each other.

The more infamous case involved an Enfield police officer terminated for using marijuana. He admitted to smoking pot, but only in his home, off duty, and not in front of his children. As we previously reported, a panel of the State Board of Mediation and Arbitration reduced the discharge to a suspension, citing the fact that the officer had a good record, his marijuana use did not affect his job performance, and he had completed a drug education course. However, a trial court judge overturned the award, citing additional damaging facts not mentioned by the arbitrators, but included in the record of the arbitration hearing. For example, the officer purchased the pot from a known drug dealer.

Now an Appellate Court panel has reversed that decision and reinstated the original award. They said the issue was not whether the officer's conduct violated public policy, but whether his reinstatement after a suspension was contrary to a clearly established public policy. They also pointed out the policy in favor of rehabilitating those who engage in criminal conduct. On balance, they said, they couldn't find the arbitration award so egregious that it had to be set aside.

The other case involved a New Haven firefighter terminated for accessing personal information about co-workers on a departmental data base, in violation of the employer's computer policy. An arbitration panel ordered him reinstated after an eight month unpaid suspension, citing the fact the employee credibly testified he didn't think he needed permission to access the information because it was necessary for him to do his job. However, a Superior Court judge vacated the award, because the employee's actions violated the clearly established public policy against invasion of personal privacy.

As in the Enfield case, an Appellate Court panel has now set aside that decision and reinstated the arbitration award, stating that an eight month suspension sufficiently recognizes the public policy issues involved in the case. It pointed to the employee's reasonable belief that permission was not needed, as well as the arbitrators' finding that the fire department was lax about enforcing the computer policy.

Our opinion is that all this flip-flopping demonstrates that public policy is often in the eye of the beholder, and that perhaps the only reliable definition is "we know it when we see it." Unfortunately, this leaves both labor and management in a position where the only way to know whether a public policy argument will work is to make it, and if you don't prevail, keep appealing to the next level in the hope of finding a judge who agrees with you.

LEGAL BRIEFS *. . . and footnotes*

Teacher-Student Sex is a Crime: A public school teacher challenged the Connecticut statute making it a crime for a teacher to have intercourse with a student. He claimed the law was unconstitutional in that it violated his right to sexual privacy. Our Supreme Court ruled against him, pointing out that a teacher-student relationship is inherently coercive, and therefore voluntary consent is impossible. The only remaining question is, did he really think his conduct was appropriate?

Supreme Court Ducks Decision on Ministerial Exception: In our last issue we reported on a Connecticut case in which the court declined to apply anti-discrimination laws to a church's decision not to promote a priest from Africa. Only a few months later the U.S. Supreme Court refused to hear a claim by a female chaplain at a Catholic University that her position was restructured and downgraded due to sex discrimination. A lower court had thrown out her claim, citing a "ministerial exception" to employment discrimination laws, and the Supreme Court declined to consider her argument that religious employers should only get a free pass when it comes to discrimination based on religious beliefs.

Prisoner Removed from Job Gets No Hearing: The Department of Corrections, being a governmental entity, can't fire an employee without a hearing. But what if it terminates the work assignment of an inmate because of poor performance? A Connecticut Appellate Court panel has ruled that since there is no employment relationship between the state and its prisoners, and no statute permitting an appeal under the Uniform Administrative Procedure Act, prisoners have no right to judicial review of a decision removing them from a work assignment.

Firefighter Fitness Doesn't Trigger Workers Comp: A Connecticut statute extends workers compensation benefits to volunteer firefighters injured in the line of duty, or while engaged in training. However, our Supreme Court has affirmed an Appellate Court decision that says "training" does not include participating in an open gym basketball program, even if part of the reason for the program is to help volunteer firefighters meet departmental fitness standards.

Cell Phone Abuse Constitutes Willful Misconduct: A trucking company fired an employee for violating its rule against personal use of company cell phones, except for family emergencies and occasional incidental use. The employee racked up 1200 minutes one month and 1100 the next, while other employees used less than half that amount. The employee was denied unemployment compensation, and a court rejected his appeal, concluding that he was guilty of willful misconduct.

SBMA Witness Statements Must Be Sworn: While hearsay evidence is often admitted in arbitration proceedings, an Appellate Court panel has ruled that written statements of witnesses can't be admitted in cases at the State Board of Mediation and Arbitration unless they are sworn affidavits. The case involved an Ansonia police officer terminated for possession and use of illegal drugs. Many employers conducting investigations of employee misconduct obtain witness statements without administering an oath.

This case points out the risks of relying on such statements without having the witness available to testify in arbitration. However, the court said there was enough other evidence in the Ansonia case to sustain the discharge anyway.

No New Wage Violation With Each Paycheck: The Supreme Court has ruled that the statute of limitations for equal pay claims runs from the date when the employer makes and implements an allegedly discriminatory compensation decision, and the clock does not reset with every periodic paycheck computed based on the rate that results from that decision. Critics complained that this will make it more difficult for women to achieve pay equality in the workplace, because claims can't be filed based on discriminatory decisions made years ago.

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