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Labor & Employment Law Department

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Employee Speech Cases Raise Tough Issues for Employers

Last fall we reported on an NLRB case involving an EMT for American Medical Response of Connecticut, where the Hartford office of the Board took the position that AMR could not fire the employee for badmouthing her boss on Facebook. The claim was that the employer maintained and enforced an overly broad policy that prohibited (among other things) disparaging remarks by employees about the company or its management, or depicting the company in any way on the internet without its permission. Although the case involved a unionized employer, the same issue could arise in a non-union setting.

AMR has settled with the NLRB, but the result has raised more questions than answers. AMR agreed to modify its policies to make it clear that employees are not prohibited from discussing their working conditions with co-workers during working hours, or with co-workers and others outside working hours. The NLRB concluded this resolved the problem of the policy being enforced in a way that penalized employees from engaging in "concerted protected activity." AMR also reached a financial settlement with the employee by which she agreed not to return to work.

The problem is that employers are left with little or no guidance as to exactly how far employees are free to go in complaining about their employers or supervisors. NLRB decisions dating from decades ago draw a clear distinction between employees who discuss with co-workers their concerns about wages, hours and working conditions and those who engage in mere "griping." Nobody knows where the current Board would draw that line. Also, most people would make a distinction between conversations around the water cooler in the workplace and mouthing off on the internet for all to see. It's not clear whether today's NLRB would recognize that distinction.

An example of the current Board's liberal approach to employee expression is a very recent decision involving unionized employees of AT&T Connecticut who expressed their dissatisfaction with the company by wearing T-shirts that said

"Prisoner of AT$T" on one side and "INMATE # __" on the other when they made customer service calls or performed maintenance work in residential areas. A majority of the NLRB ruled AT&T committed an unfair labor practice when it disciplined workers who refused to stop wearing the shirts.

"AMR has settled with the NLRB, but the result has raised more questions than answers...."

All this is in stark contrast to the approach of the Connecticut General Assembly when it comes to employer speech. The legislature is once again considering a bill that would prohibit employers, whether unionized or not, from expressing their views on politics, unions, or certain other subjects to a "captive audience" of employees, even though the employees are on the clock at the time.

Our advice to employers is to review their policies and modify them as necessary to minimize the risk of an unfair labor practice charge. One way to do that is to focus your policy on public comments that damage the company's reputation or that of its personnel or products rather than statements to co-workers or other associates about wages, hours and working conditions. Another is to use positive rather than negative terms, such as being respectful and thoughtful when discussing the employer in a public forum, and distinguishing between the employee's views and those of the company. Yet another is to build into your policy examples of acceptable and unacceptable behavior or speech that make it clear the policy will not be applied in a manner that could be construed as overly broad.

Gender and the Job: It's Complicated

Employers are thoroughly familiar with the statutes prohibiting discrimination on the basis of sex, as well as the principle that sexual harassment is a form of sex discrimination, and is therefore equally illegal. But what about job-related bias based on sexual orientation, gender identity, or transgendered status? In most cases, the answer is, "It depends."

Under federal law, there is no prohibition against employment discrimination on these grounds, unless it can be proven that the discriminatory action was based on the employee's sex. Just last month, for example, a federal court judge threw out a complaint by an employee of Waterbury Hospital that he and his same-sex partner were being harassed because of their sexual orientation. The judge said Title VII of the Civil Rights Act did not provide a remedy unless the employee could show the harassment was based on his gender.

Although Representative Barney Frank (D-Mass.) has proposed federal legislation to ban job discrimination based on sexual orientation or gender identity, the prospects for passage seem doubtful given the current political climate. Under state law in Connecticut and many other jurisdictions, however, employment discrimination based on sexual orientation is specifically prohibited. Some of those statutes also cover discrimination based on gender identity, although Connecticut's does not, at least not yet.

There is a bill currently pending in the legislature, however, that would prohibit discrimination based on gender identity or expression, including employees who are transgendered or who identify or express themselves as members of the opposite sex. Similar bills have died in the past, and opponents point to problems such as sharing restrooms with individuals who are not biologically of the same sex, or teachers confusing children as they change their sexual identity. However, Governor Malloy might be

Recent S&G Website Alerts

Supreme Court Scratches the Surface of Discrimination Claims with "Cat's Paw" Theory of Liability, 04/11

Evidentiary Portions of Teacher Interest Arbitration Must be Open to the Public, 03/11

Supreme Court Broadens Protections for Employees Who File Discrimination Claims, 02/11

more willing to sign such legislation than some of his predecessors.

Some argue that those who have changed their gender are protected even without legislative action. A recent decision by a Superior Court judge concluded that a transgendered Hartford police officer could pursue a discrimination claim, citing a declaratory ruling by the CHRO in 2000 suggesting that Connecticut law should be read to prohibit all forms of discrimination, including bias against transgendered people. He also found that the medical challenges that follow sex reassignment surgery can constitute a physical disability. That case is being appealed.

Our advice, as always, is to make sure that any adverse employment action can be justified based on objective, job-related considerations, preferably backed up by thorough documentation, because you never can be sure whether the action will be challenged based on the employee's membership in a protected classification.

Workplace Shooting Results in Dependent Dispute

After eight people were killed by a co-worker at Hartford Distributors last year, a question was raised about the death benefit provided under Connecticut's workers compensation law, and whether it is payable to the live-in fiancée of one of the victims. The company's insurance carrier took the position that case law going back to the early part of the last century makes it clear that an unmarried live-in is not a spouse or relative, and therefore is not entitled to a death benefit.

Counsel for the fiancée disagreed, pointing out that the cases relied upon by the workers comp carrier all involved situations where there was some other relative to whom the death benefit could be paid. Further, in those days an unmarried live-in relationship was considered to be essentially illegal. The philosophy behind the workers comp death benefit, according to the attorney, was to provide some relief for those who were economically dependent on the deceased, and that logic applied to the fiancée here.

The amount at issue in this case is $500 per week for six years. By comparison, if a worker dies with no dependents, as was the case with some of the victims of the Kleen Energy blast, workers comp only makes a single $4000 payment intended to cover funeral expenses.

Our opinion is that if the law is to be expanded to include people who are not related by blood or marriage, it ought to be the legislature that does it, so that specific standards and definitions can be included. If the courts grant benefits to the fiancée of the Hartford Distributors employee, what about couples who plan to get married but aren't actually engaged, or couples who live together but have no plans to marry? It's a slippery slope, and one that is not well suited to case-by-case determinations by judges.

Legal Briefs *and footnotes...*

CT Contractors Targeted: The Wage and Hour Division of the U.S. Department of Labor has announced an initiative to track

down and eliminate minimum wage, overtime, and record-keeping violations at construction sites in Connecticut and Rhode Island. In the last decade, the DOL assessed $5.6 million in back wages against construction contractors in the two states. The District Director in Hartford says that stiff competition in the industry has driven many contractors to cut corners to lower costs. He says this puts those who play by the rules at a disadvantage.

Training Isn't a Binding Contract: A creative breach of contract claim by terminated employees of a Connecticut company has been rejected by the courts. The plaintiffs claimed their former employer instructed its supervisors to follow the principle of progressive discipline, and since they were terminated without prior warnings, they said the company was in violation of a binding commitment created as a result of the course materials used in training its supervisors. A trial judge ruled that as a matter of law such training could not be construed to create a contractual promise, and an appellate panel agreed.

Drug Tests and Public Policy: Perhaps surprisingly, a Superior Court judge has rejected an argument by the Town of North Branford that an arbitration award was contrary to public policy because it reinstated a driver who twice violated the town's drug testing procedure, even though the employee was in a safety-sensitive transportation position. The court pointed out the driver had not actually failed a drug test, but had violated the Town's policy by failing to produce a urine sample on one occasion and leaving the testing area on another.

Another Union at Foxwoods: The NLRB has certified United Food and Commercial Workers to represent over 300 beverage servers at Foxwoods, the Mashantucket Pequot owned resort and casino. The Board rejected management claims that the election results should be overturned because the union had improperly appealed to ethnic prejudice by suggesting the servers needed protection in light of the employer's preferential treatment of Native American workers. It concluded the UFCW's statements were not racially inflammatory, but rather based on legitimate and factual considerations. Over 2500 Foxwoods dealers are already represented by the UAW.

Invasion of Employee Privacy: A judge has refused to dismiss a claim by an employee that his employer invaded his privacy by surreptitiously video recording a conversation he was having with his co-worker. The judge said the company's action could constitute a violation of the "intrusion on the seclusion of another" provisions of Connecticut's law covering invasion of privacy. The decision is yet another reason why employers should scrupulously follow the Connecticut statute requiring notice of electronic monitoring in the workplace.

Save the Dates

We will offer 3 Sexual Harassment Prevention Training seminars on the following dates:

April 12 - Hartford
April 14 - Stamford
April 28 - Hartford
To register, visit www.shipmangoodwin.com.

Our annual Fall Seminar is scheduled for Wednesday, November 2, 2011 at the Hartford Marriott Downtown.

Please mark your calendars and plan to join us.

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