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Employment Law Letter

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Labor & Employment Practice Group

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SCOTUS Says Casino Driver Can't Use Tribal Immunity

How often does the Supreme Court of the United States decide a case that specifically affects a Connecticut employee? And how often are its decisions unanimous? Both occurred recently when the high court reviewed a dispute involving a limo driver who worked for the Mohegan Gaming Authority.

The lawsuit resulted from a motor vehicle accident in which the plaintiffs were seriously injured, allegedly because of the negligence of the defendant limo driver. He claimed that because he was employed by the tribe, which had agreed to indemnify him in the event of any liability, and therefore would be ultimately responsible for paying any damages, he could take advantage of tribal immunity.

As we reported earlier this year, the Connecticut Supreme Court unanimously agreed with him. The justices said that even though the accident took place off the reservation, the limo driver was acting within the scope of his employment, and therefore the lawsuit was effectively against the Mohegan tribe, which was entitled to tribal immunity.

The U.S. Supreme Court didn't buy that logic, which it pointed out would allow tribal-owned enterprises to pass laws indemnifying all their employees against liability, and thereby grant immunity from suit to everyone who worked for them. That would effectively give tribal employees more protection than that afforded to federal government employees. It would also mean that tribes would never have to pay anything under such indemnity provisions, because they themselves would be entitled to immunity.

Our opinion is that the U.S. Supreme Court got it right, and the Connecticut Supreme Court didn't. Sovereign immunity should only apply when a tribe is being sued in its capacity as a governmental entity. It is hard to argue that driving a limo for hire is a governmental function, and the plaintiffs in this litigation made it clear they were only going after the limo driver, not the tribe.

This case could have ramifications for Indian casinos and other tribal enterprises across the country, so the Mohegans had the support of many other Indian tribes, who presumably were not happy with the outcome.

The lawsuit is not over, however, as it now goes back to the Superior Court in New London to determine whether the limo driver was responsible for the plaintiffs' injuries, and if so what the monetary damages should be. Pursuant to the driver's contract, any such damages should be covered by the tribe.

Can You Call Your Boss a Motherf***er on Facebook?

Most reasonable people would assume that if an employee calls his boss a "nasty Motherf***er" on social media, he is subject to discipline or discharge, whether for insubordination or incivility or any other applicable offense. However, the U.S. Court of Appeals whose jurisdiction includes Connecticut, in addressing an appeal from a National Labor Relations Board ruling, has issued an opinion suggesting that discipline may not always be justified, depending on the circumstances and context.

The case involved a server at a high-end venue in Manhattan who had words with his supervisor just a few days before a union election. He went outside to cool off, and used his iPhone to post the following (unedited) message on Facebook: "Bob is such a NASTY MOTHERFUCKER don't know how to talk to people!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"

As you no doubt have guessed, the reference to voting for the union played a large part in the NLRB's decision that the server's conduct was protected activity, and that his resulting dismissal was therefore unlawful. But the Court of Appeals noted several other factors that led it to agree with the NLRB's conclusion.

For one thing, allegations of hostile and degrading treatment of employees by supervisors were a significant issue in the union campaign, so the server was not just voicing his own personal viewpoint, but reinforcing complaints lodged by others. That made his activity "concerted" even if he was not directly engaged in dialogue with others when he posted his message.

For another, there was evidence that profanity was commonplace in this particular workplace, including the specific words at issue in this case, and yet nobody had ever been disciplined for it, let alone fired. The fact that the union election was only a couple of days away was strong circumstantial evidence that management's motivation was not simply a desire to enforce civility in the workplace.

Also, the court noted that the server's rant was not in front of customers, but was addressed to co-workers who were "friends" on Facebook. Although his privacy settings allowed others to see his message, he claimed that was a mistake and changed his settings within a few days. The appeals court judges concluded that although the conduct of the employee in this case "sits at the outer bounds" of protected activity, it was not so "opprobrious" as to lose the protection of the National Labor Relations Act.

Our advice to employers is to think twice before firing someone based on critical statements he or she has made about management. Under President Trump's NLRB, some pro-employee decisions issued under the previous administration may be modified or reversed. This could be particularly true with respect to decisions that affect non-union workplaces as well as unionized facilities. Meanwhile, however, cases like the one reported here reflect the law of the land.

Double-Dipping Mayor Loses Appeal

When he was Mayor of East Haven from 1997 to 2007, Joseph Maturo received both a full-time salary as mayor and a disability pension benefit based on a back injury incurred when he was an East Haven firefighter. But by the time he was elected again in 2011, the State Retirement Commission had changed its position on the interpretation of the applicable statute, and suspended his pension payments.

The law has long stated that someone cannot collect a pension

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from the Municipal Employees Retirement Fund if they also have a full-time job with a municipality that participates in MERF. At one point the state said that prohibition only applied if the pensioner was re-employed in a position covered by MERF, as opposed to a position (such as elective office) that is not covered by MERF. In 2009, however, the state changed its position, based on the language of the statute, which is not limited to positions covered by MERF. Mayor Maturo challenged that conclusion.

Just a few days ago, the Connecticut Supreme Court rejected his arguments. They not only agreed with the state's interpretation of the statute, but also found the state was not precluded from changing its position to correct its erroneous interpretation, even if it had applied that interpretation for many years.

Mayor Maturo earned the nickname "Taco Joe" when he responded to a question about allegations that the East Haven Police Department discriminated against Latinos by suggesting that he would have tacos for dinner. Although he is a Republican, apparently he has friends in both parties at the legislature. They twice passed bills that would have restored the ability of Mayor Maturo and potentially other public officials to "double dip," but Governor Malloy vetoed both of them.

Our opinion is that the Supreme Court was correct. Connecticut's public sector retirement benefits are generous enough without adopting and maintaining liberal interpretations that end up costing the system even more money.

Labor Cases Can Still Bring Big Dollar Results

Most employment litigation is relatively routine, e.g. claims of discrimination, unpaid wages, breach of contract, etc. The average case gets resolved for something in the five-figure range or less. Many employers have insurance policies that pay much of that cost. But once in a while there is a six- or even seven-figure result that reminds employers that not all employee lawsuits are routine.

One factor that can influence such an outcome is jury outrage at employer behavior that shocks their conscience. Last month a jury awarded a Connecticut trucker $425,000 in punitive damages (plus other economic and non-economic damages) after finding that he was fired for twice refusing to drive a truck that exceeded the state limit of 80,000 pounds.

The employer denied that this was the reason for the firing, and claimed they had been "set up" in part by the trucker's use of secret recordings of conversations. They even went so far as to sue him for this, which probably didn't do much to help the jury's view of the company. The punitive damages will be reduced, because the applicable law has a $250,000 cap on such awards, but the message is clear: Don't retaliate against employees for doing what they reasonably believe is right.

Another type of employment lawsuit that can cost big bucks is the class action, in which many similarly situated employees band together in a single lawsuit that can be worth millions, even though each individual's recovery may be modest. Ocean State Job Lot was hit with a class action brought by assistant store managers in the northeast, who alleged that they were improperly categorized as exempt under wage and hour laws, and as a result were denied overtime pay, despite working up to 54 hours per week.

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A federal court trial in Connecticut ended up with a hung jury, not once but twice. However, after eight years of litigation both sides apparently decided enough was enough, and they recently settled for $1.9 million.

Our advice to employers has always been to be conservative about employee classification under the wage and hour laws, in part because damage awards can be doubled or even tripled in some cases. Also, when faced with a legal claim by one or more employees, take a hard look at the strength of your defense early on, and if it is less than airtight, consider a modest settlement as a better option than risking a six- or seven-figure loss.

Legal Briefs
and Footnotes

Manpower Workers a Mixed Blessing: Connecticut has a Lent Employee Statute that makes it clear that someone who works for a manpower agency is an employee of that agency, and not of the entity that contracts for and directs his or her work. The fact that such workers are not considered to have dual or joint employment status, as is the case in some states, is generally considered to be a benefit to the entity where he or she works. However, that's not always true. A judge recently ruled that a borrowed worker could sue for a workplace injury in Connecticut, even though if he had been considered to be a dual or joint employee, workers compensation would have been his only remedy.

Is Chemical Sensitivity a Disability? That question was presented in a case brought under Connecticut's Fair Employment Practices Act. A Superior Court judge has ruled that while a general sensitivity to multiple chemicals may constitute a disability, and therefore create a duty for an employer to provide a reasonable accommodation, the same may not be true of an employee's sensitivity to certain specific chemicals used in a particular employer's operation. Unfortunately, it will likely take a trial to find out which side of the line a given employee's case falls on.

Teacher Evaluations and FOIA: Earlier this year we reported on a Freedom of Information Commission ruling that the Connecticut statute exempting teacher evaluations from public disclosure did not apply to summary data derived from multiple individual evaluations. The teachers' union in New Milford appealed that ruling, but now a court has affirmed it, and ordered the summary data to be released.

Workers Comp During Lunch: Does workers compensation cover an injury that occurs while an employee is on her lunch break? Apparently it does, at least under certain circumstances. A Yale New Haven Hospital worker sustained injuries from a slip and fall as she was crossing a street during her lunch hour. The Compensation Review Board awarded benefits because she was going to her car, which was parked in a hospital-provided garage, and such activity was deemed "incidental to her employment."

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