ROUTE TO: _____ _____ _____

Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

WINTER 2005

NATIONAL NEWS

Connecticut employers should be aware of these important developments at the national level. More information is available by contacting any member of the Labor and Employment Law Department of Shipman & Goodwin LLP.

- **Attorneys Fees Taxable:** The Supreme Court has resolved a lengthy debate over whether fees paid to lawyers as part of the resolution of an employment lawsuit are taxable to their clients. The justices ruled recently that fees awarded as part of a judgment or settlement in such a case are taxable income to the employee. Such amounts may nevertheless be deductible under legislation signed last fall by President Bush, but the Supreme Court's decision will at least impact the employee's alternative minimum tax computation.

- **SSA Notice Required:** An obscure part of the Social Security Protection Act of 2004 requires that starting January 1, 2005, state and local government employers must notify new hires in jobs not covered by Social Security that their future benefits may be reduced. Such employees must sign a statement indicating they are aware of the potential reduction. Details are available at www.ssa.gov/form1945.

- **Union Membership Declines:** The U.S. Department of Labor reports that the percentage of wage and salary workers who belong to unions continues to decline. In 2004 it stood at 12.5%, down from just over 20% in 1983, the first year in which comparable statistics were compiled. Setting aside government employees, and focusing on the private sector (which accounts for about four-fifths of the U.S. labor market), the percentage of unionized workers was just under 8% last year, or about half what it was in 1983.

Pequot Tribe Hit With $15.2 Million Judgment

Not all of the profits from Foxwoods go toward enriching the Mashantucket Pequots. A chunk of them may go toward making three former employees wealthy too.

The trio worked for the Mystic Hilton when it was acquired by the tribe, and (along with the Norwich Inn and Spa) became Pequot Mystic Hotel LLC. In 2000 they were fired, based on what a jury later found were trumped-up charges of fiscal mismanagement.

The jury concluded that certain former officials of the tribe conspired to get rid of three managers, and when they couldn't find a legitimate basis for doing so, they conducted a sham investigation, deliberately misconstrued some evidence and ignored exculpatory evidence, and conducted "hostile and unwarranted interrogations."

The verdict on the employees' claims of intentional infliction of emotional distress and defamation was $6.8 million, to which the trial judge added $3 million in punitive damages. With interest computed at 12% over the years since the lawsuit was filed, the judgment totaled over $15 million. The Pequots have appealed, but meanwhile interest is compounding at nearly $2 million per year.

Central to jury's verdict was a finding that the employer's conduct was "extreme and outrageous," and that the impact on the employees was devastating. Mental health professionals testified that one of the plaintiffs was severely depressed and unable to work. Another plaintiff cried when describing his outrage over being asked to sign a statement he believed was false.

Our opinion is that juries believe employers (like most other people) can occasionally make an honest mistake, but what they won't tolerate is an employer who treats his employees maliciously. If the tribe had an opportunity to settle this case on reasonable terms before the jury spoke, it should have grabbed it.

Anthem BCBS Money Still Hotly Contested

It's been more than three years since the demutualization of Anthem Blue Cross and Blue Shield, which resulted in the payout of many millions of dollars in cash and stock to BCBS policyholders. However, the fight over who was entitled to benefit from those payments, at least in some cases, goes on.

The biggest battle, in terms of potential consequences, involves the State of Connecticut, which received almost $100 million as a result of demutualization. Under the terms of the restructuring that led to the payments, the money went to BCBS "members," a term that Anthem generally interpreted to mean the entity or group that contracted for coverage, not the individual covered employees. A group of state workers, however, is pursuing a class action lawsuit alleging that Anthem paid the wrong party, and claiming that it owes individual state employees another $93 million.

A Superior Court judge has denied Anthem's motion for summary judgment, ruling that there are "questions of material fact" as to whether Anthem paid the right party. The court also ruled that Anthem's reliance on its internal records in order to determine who was the proper "member" to pay only provided a rebuttable presumption of correctness, not an absolute defense.

Meanwhile, on the local level, the union representing teachers in Wallingford won a round in its fight for a share of the demutualization proceeds paid to that municipality. The Connecticut Supreme Court has ordered the Wallingford Board of Education to arbitrate a grievance filed by the teachers' union seeking a pro-rata portion of the BCBS money based on the percentage of the health insurance premiums paid by teachers.

The interesting twist in the Wallingford case is that the demutualization proceeds were paid to the town, not the board of education. The town is not a party to the teacher union contract, and therefore may not be bound by the results of the arbitration. This raises the question of whether the board of education will have to dig into its own pocket if the union wins but the town refuses to pay.

Our opinion, as we said in an earlier report on the debate over the allocation of the BCBS demutualization proceeds to local government employees, is that money paid to municipalities and boards of education is most appropriately distributed in proportion to who paid the premiums for the coverage. If employees paid 10% of the cost, they should get 10% of the proceeds.

Waterbury Workers Challenge Pension Cuts

In a flurry of lawsuits filed on behalf of various individuals and groups of employees, Waterbury workers are challenging a round of restructuring of pension benefits mandated by the Waterbury Financial Planning and Assistance Board. The cases raise fundamental questions about whether pension benefits for public employees can ever be reduced.

The State Oversight Board, as it is commonly known, acts as the arbitration panel for union contracts when they expire, and in that capacity has tried to shore up Watebury's nearly bankrupt pension system by adding such common-sense provisions as requiring actuarial reductions when employees elect to take their pension with spousal survivor benefits, and computing pensions based on an employee's average earnings over the past three years, rather than his rate of pay on the date of retirement.

The lawsuits are based on various theories, ranging from unconstitutional taking of property without due process of law to detrimental reliance on the generous benefits employees had come to expect. In those cases where pension terms were changed based on agreements with unions rather than arbitration awards, some plaintiffs have claimed their union conspired with management to take away their rights. Although no Connecticut cases provide any direct precedent for any of these arguments, there are a few decisions from other jurisdictions that the plaintiffs claim support their position.

Taken together, these cases present a fundamental challenge to the ability of employers, at least public sector employers, to reduce pension benefits in any way after an employee becomes "vested," usually after 5 or 10 years of employment. They also present an intriguing question about collective bargaining over pensions, namely whether negotiations can only go one way…up.

EMPLOYMENT LAW LETTER

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LEGAL BRIEFS

and footnotes

Polygraph Made Public: When the Old Saybrook Police Department requested the results of a polygraph test taken by an applicant for employment with the Waterford Police Department, the request was turned down on the grounds the results were confidential medical records. The Freedom of Information Commission disagreed. It ruled that with the exception of some purely personal matters, the material was related to the applicant's character and qualifications for employment, which were matters of public concern. Disclosure was therefore required, even if release of some of the material would be "highly offensive to a reasonable person".

No Comp for First Aid: When an employee experienced a grand mal seizure at work, he flailed his limbs and thrashed around so much that co-workers restrained him to prevent injury. Unfortunately, they inadvertently dislocated both his shoulders. He sought workers compensation, but was denied. The commissioners ruled his injuries were not connected with a job-related illness or injury, but rather were the result of "first aid" offered by well intentioned co-workers for a purely personal illness or condition.

Pretext or Prerequisite: The CHRO found that the Department of Transporation discriminated against an engineer from Sri Lanka because its reasons for denying him a promotion, including a poor interview, were pretextural. A reviewing court found at least one of the DOT's reasons, namely lack of a professional engineer's license (after failing the exam three times), was not pretextual since the license was a known prerequisite for the job. The judge said the case should go back to the CHRO, but the DOT appealed to the Connecticut Supreme Court, which ruled that as a matter of law, one legitimate reason for denying the promotion was sufficient to defeat the employee's claim.

Basketball Bruises: A volunteer firefighter from Watertown sought workers compensation benefits after being injured in a basketball game. Winter basketball and summer softball games were organized by the fire department to help keep its members physically active. Although credits for participation counted toward retirement, the activities were voluntary. A trial commissioner ruled the games constituted training, so the injury was compensable. The Compensation Review Board disagreed, however, and ruled that physical activity unrelated to fire duties did not constitute training.

State WARNed off: When the Hastings Hotel in Hartford closed and 117 employees were laid off with no notice, the City and State filed WARN Act claims along with the affected workers. However, a federal judge has ruled that the State has no standing to bring claims for violation of employee rights under the WARN Act. The State was dismissed from the lawsuit; the City voluntarily withdrew.

Chronic Condition Question: There are lots of cases across the country addressing the question of what constitutes a disability under the ADA, but very few cases in Connecticut shed light on the definition of a physical disability under our Fair Employment Practices Act. A federal appeals court recently referred to the Connecticut Supreme Court the following question: What constitutes a "chronic" condition under the FEPA? The appeals court needed the answer to determine whether a lower court was justified in dismissing an employee's claim of physical disability discrimination because his injuries were not serious enough to render him disabled under state law.

Caught Relieving Himself: While making a delivery to a customer, a driver felt the urge to urinate. Since there was no public restroom nearby, he went to a deserted area behind a delivery truck. Unfortunately for him, the customer had video surveillance, and caught him on tape. When he was fired, he sued alleging discrimination based on his age (60) and physical disability (enlarged prostate). His discrimination claims were thrown out because he failed to exhaust his administrative remedies with the CHRO and EEOC, and the court declined to find a public policy violation in a discharge under such circumstances.

No Definition of Cause: An employee signed an employment contract stating that he would get no severance if he were to be "terminated for cause (to be defined)." He was later fired, with no definition of cause having been agreed upon. He sued to severance benefits, and the employer urged the court to adopt a standard definition of cause for purposes of interpreting the agreement. The judge declined to do so, noting that the "to be defined" phrase suggested a non-standard definition might have been contemplated. In the absence of an agreed definition, he found the "for cause" provision to be inoperative.

Racist Joke Backfires: An arbitrator has upheld the discharge of a Department of Corrections guard who tried to photocopy on a DOC copier an announcement to the effect that due to a shortage of big game animals to meet the needs of hunters, an open season on "porch monkeys" had been declared. Instead of making a copy, the machine stored the image, which was discovered later. Although the guard had nine years of service with no prior discipline, the arbitrator said that given the delicate state of race relations in the DOC, anyone who viewed the document as a joke was not capable of working there.

S & G Notes: Our spring seminar for public sector employers has been scheduled for May 24 at the Rocky Hill Marriott. Invitations will be sent in April.

Now We've Seen Everything . . .

We usually report on labor and employment law decisions in Connecticut, or highlight key developments on the national scene. Occasionally, however, we come across a story that leaves us just shaking our heads.

Facial Piercing: A Costco employee in Massachusetts was terminated because she refused to conceal her multiple facial piercings while at work. She claimed that doing so would violate her religious principles as a member of the Church of Body Mortification. The federal courts said Costco's "no facial jewelry" policy reflected a legitimate corporate interest in its public image, and the employee refused a reasonable accommodation, i.e. covering or temporarily removing her hardware. She claimed other employees had violated the policy and had not been fired, but Costco showed it addressed violations whenever they were brought to its attention.

Police Videos: The Supreme Court wasted little time throwing out a first amendment claim by a San Diego police officer who sold on eBay videos of himself stripping off his police uniform and engaging in sex acts. He was fired when he continued his business after being told to end it. The high court said the content of the videos was not a matter of public interest, and therefore was not entitled to constitutional protection. There is speculation that the justices only took the case because it offered an opportunity to rebuke the Court of Appeals for the Ninth Circuit, which has been criticized by conservatives for its left-leaning decisions, and which looked more favorably on the officer's complaint.

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