Employment Law Letter

Summer 2009

NATIONAL SPOTLIGHT SHINES ON NEW HAVEN DISCRIMINATION CASE

On the last day of its 2008-2009 term, a sharply divided U.S. Supreme Court ruled that the City of New Haven discriminated against white firefighters when it decided not to use the results of a promotional exam because no black firefighters scored high enough to qualify for any of the open officer positions in the fire department. The decision reversed a narrow loss for the white plaintiffs at the Court of Appeals level, where Supreme Court nominee Sonia Sotomayor sided with the City.

New Haven was faced with two unattractive choices when a professionally developed and apparently objective test produced lopsided results. It could either use the results and get sued by the minority applicants, or discard them and get sued by those who got high scores. It chose the latter. While the lower courts said the City could not be faulted for good faith efforts to avoid a discriminatory result, the high court saw it differently.

The justices analyzed the situation in terms of two different types of discrimination. One is disparate treatment, where minorities and non-minorities receive different advantages or disadvantages at the hands of decision-makers. The other is disparate impact, where apparently neutral criteria produce less favorable results for a protected class. While trying to avoid the second type of discrimination, the court said, the City engaged in the first kind.

But that didn't end the inquiry. Even intentional discrimination can be justified by business necessity, as when a female is required for a public safety position that involves searching female suspects or prisoners. The plaintiffs said discarding test results based on racial statistics can never be justified, while the defendants argued it was justified by a good faith effort to avoid discriminatory impact. The Supreme Court majority steered between

IN SUMMARY:

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those views, and ruled that test results could be rejected if there was a "strong basis in evidence" that unsuccessful minority candidates could prevail in a disparate impact discrimination claim.

The majority of the court found no basis in the record for concluding that the City met this burden. There was no indication that the test in question was not job related and consistent with business necessity, and no evidence that there existed an equally valid but less discriminatory alternative that met the fire department's needs. The justices sent the case back to the trial court for the sole purpose of fashioning a remedy for the plaintiffs, presumably to include back pay and attorneys' fees.

The four dissenters said the majority gave insufficient weight to the importance of eliminating barriers to job equality for minorities. In their view, a good faith attempt by an employer to avoid disparate impact discrimination is simply not the type of conduct that Congress intended to prohibit. They also criticized the majority for not giving the City the opportunity to present arguments to the trial court based on the majority's new "strong basis in evidence" standard.

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Our advice to employers, both public and private, is to do everything reasonably possible to determine in advance whether selection devices will stand up to scrutiny in the event minority candidates do not perform well when they are used, because the New Haven case makes it difficult to fix a problem after test results are in. It is not clear how the courts will apply the "strong basis in evidence" test, but nobody wants to be the first employer to find out.

Health Care Picketing Not Grounds for Discharge

Section 8(g) of the National Labor Relations Act requires unions to give a health care institution at least 10 days' notice before "engaging in any strike, picketing, or other concerted refusal to work." When AFSCME Local 1000 tried to organize workers at a New York health clinic, they set up a picket line without giving the required notice. Five off-duty employees of the clinic participated in the picketing, which did not impede the operation of the facility.

The clinic filed an unfair labor practice charge against the union, and terminated the five workers for engaging in unprotected conduct. Although the charge against AFSCME was settled, the union filed its own charge based on the firing of the five employees. The case went to the NLRB in Washington, which ruled that the discharges did not violate the NLRA. However, the union pursued the matter to the Second Circuit, the federal appeals court with jurisdiction over New York and Connecticut.

The court examined the language of the applicable labor laws, and concluded that while unions are subject to sanctions if they violate Section 8(g), no such sanctions are specified for employees. The judges also noted a

distinction between this provision and Section 8(d)(4), which states that an employee who engages in a strike before the 10-day notice period has expired "shall lose his status as an employee" and therefore is subject to dismissal. They said this was evidence that Congress intended to draw a clear distinction between picketing and striking before a 10-day notice expires.

The same court ruled on another aspect of labor law as applied to health care facilities only a few months earlier. In that case, District 1199 SEIU struck a home health care agency after giving the required 10-day notice. However, when the employer tried to apply its usual absence notification rules by asking employees to inform management if they intended to participate in the strike, 48 of them failed to do so, and were no-shows on the first day of the work stoppage. While other employees were reinstated as soon as the strike was over, reinstatement of the 48 took from a week to a few months.

The NLRB found the employer violated the law by effectively punishing the workers for participating in a lawful strike. However, the Second Circuit sent the case back to the Board for reconsideration in light of the "plant rule" doctrine, under which an employer has the right to enforce neutral, non-discriminatory employment policies even if they impact to some degree the exercise of employee rights.

Our opinion is that the purpose for the notice requirement in health care settings is to protect the interest of patients. Enforcing a rule requiring notification by individual employers if they don't intend to show up for work is consistent with that purpose.

Recent S&G Website Alerts:

Supreme Court Upholds Promotional Test Despite Adverse Impact, 07/09

U.S. Employers Face Crackdown for Unauthorized Workers, 07/09

Form I-9 Update, 07/09

Union and Chief at War In New Britain Fire Department

Sometimes it seems like the State Board of Labor Relations wouldn't have anything to do if it were not for fire unions. Three recent Labor Board cases stemmed from what appears to be a running battle between the Fire Chief and the IAFF, a situation complicated by the fact that the Mayor, himself a firefighter on leave during his term of office, supports the Chief.

The first case resulted from the mass transfer of about 30 firefighters from one station, shift or apparatus to another. The union claimed this was in retaliation for union activism on the part of certain of its officers, participation of various union members in a vote of "no confidence" in the Chief, and union opposition to the Mayor in his last two election campaigns. The Labor Board agreed the union had presented a prima facie case, having shown protected activity, employer knowledge thereof, and considerable anti-union animus on the part of both the Mayor and the Chief.

However, the City convinced the Board that the transfers would have occurred in any event, because they were aimed at giving firefighters broader experience in different parts of the City, on different pieces of equipment, etc. While the Labor Board found this to be a close case, they concluded the City had not committed a violation, in part because various firefighters toward whom the Chief had no apparent animosity were transferred along with others who had conflicts with the Chief.

The second case involved the president of the same New Britain Fire Union. Despite the fact that he had the highest score on a promotional exam, the Chief passed him over six straight times for lieutenant positions. The Labor Board had no difficulty concluding that the Chief was acting out of animosity for the union and its leadership. While choosing another applicant might not be suspicious if it happened once or twice, doing so six times in a row was simply too much to explain away.

The third case was a result of the City's request for a stay of the Labor Board's ruling in the union president's case, so he did not have to be placed in a lieutenant's position while an appeal of the Labor Board's decision was pending. That request was denied, since promoting the union president did not constitute irreparable injury to the City.

Our opinion is that the most interesting aspect of these cases was the City's claim that its promotion decisions could not be challenged, because the Municipal Employee Relations Act says promotional procedures are not a mandatory subject of bargaining. The Labor Board said while civil service procedures are not subject to negotiation, they cannot be used as a vehicle for illegal discrimination.

What Constitutes Infliction of Emotional Distress?

We have reported before on how frequently employees who claim to have been mistreated on the job make a claim for intentional infliction of emotional distress, usually along with other claims such as discrimination, breach of contract, or the like. Some new trends are emerging in Connecticut, however.

One thing that hasn't changed is that garden variety personality conflicts, gossip, snide remarks or even nastiness isn't legally actionable. Connecticut courts say people should be prepared to accept these things in the workplace. For example, a state employee's claim of emotional distress was recently dismissed despite allegations that her supervisor screamed at her, threatened to fire her, ordered her to restrict her interactions with certain co-workers, denied her pay raises and promotions, and gave her negative evaluations.

Normally, verbal statements alone are not actionable, unless they include comments regarding an employee's age, race, religion, ethnicity, gender or sexuality. However, extremely offensive or degrading comments may impose liability on an employer if they are accompanied by some offensive touching, especially if the actor is in a supervisory relationship to the victim.

The elements of intentional infliction of emotional distress are (1) the defendant intended to cause emotional distress, or knew or should have known it would result, (2) the conduct was extreme and outrageous, (3) the defendant's conduct caused the plaintiff's distress, and (4) that distress was severe. The courts often use the phrase, "outside the bounds of civilized conduct."

Our advice to employers is that while they can't be expected to adopt and enforce a civility code in every workplace, we all know when employee conduct becomes abusive and offensive, and it shouldn't take much to shut it down. If it does, perhaps the offender should be told to look for another job. Although there is no statutory prohibition against workplace bullying in Connecticut, the General Assembly has considered the issue in each of the last few sessions, and it wouldn't be surprising to see such legislation enacted in the next few years.

LEGAL BRIEFS
. . . and footnotes

ADA and Driving: It may come as a surprise to teenagers, but driving is not a "major life activity," at least under the Americans with Disabilities Act. The U.S. Supreme Court has let stand a ruling to that effect by federal appellate court, despite arguments that particularly in the rural west, where distances are great, driving is essential to an independent life**.**

Military Leave Revisited: In our last issue we reported on a big win for an employee who took a leave for military service in Iraq, and was not reinstated to the same or a comparable position upon his return. Change a few facts, however, and the result can be very different. A Bristol police officer sought a leave of absence to work for a security contractor in Iraq, and was advised by his union that municipal law (CGS §7-294aa) required reinstatement upon his return. As it turned out, however, the leave request was denied and the officer in fact retired from his police department position, which meant that he was not entitled to reinstatement upon his return.

SLOCO Not an Employer: The Simsbury Light Opera Company produces one Gilbert & Sullivan operetta each year, and historically has used union musicians to provide the music for the show. It even had a year-to-year contract with the American Federation of Musicians. In 2007, however, it decided to end the practice and hire non-union musicians at lower rates. The union filed charges with the State Board of Labor Relations (SLOCO isn't a large enough operation to meet NLRB jurisdictional standards), but the Board found the musicians were not "employees" with rights under state labor relations laws. Musicians work for SLOCO for only a few rehearsals and performances each year, and do not depend on it for a steady paycheck. They are in effect "freelancers", not employees in any realistic economic sense of that term.

PDA Isn't Retroactive: AT&T used to suspend seniority accrual for women who took maternity leave, before that practice was prohibited by the Pregnancy Discrimination Act. The U.S. Supreme Court recently was faced with the question of whether current computation of pension credits based upon seniority accrual that was valid at the time, but would no longer be permitted, is a violation of the P.D.A. by a 7-2 vote, the high court concluded that since the law was not retroactive, AT&T was not required to go back and recompute the service of employees whose seniority was interrupted by pregnancy leaves.

NLRB Decisions Only Take Two: The National Labor Relations Board is currently operating with only two of its five positions filled. The NLRA says three members shall constitute a quorum, except that the Board may designate a group of three or more members to exercise its powers, and "two members shall constitute a quorum" of any group so designated. As the Board's membership dwindled, a group of three members was designated to exercise the Board's powers, and the Court of Appeals for the Second Circuit, which covers Connecticut, has joined the majority of appellate courts that say the remaining two members can still conduct the business of the Board.

Wow! $4.1 Billion Awarded: The former chief marketing officer of iFreedom Communications, an internet company in (where else?) California, was awarded over $4.1 billion in damages after he was fired without cause and denied commissions he was owed. The total included compensatory and punitive damages, interest, penalties for violations of state wage and hour laws, attorneys fees, and sanctions for failure to comply

with discovery orders and other litigation requirements. The CEO of iFreedom, who represented his company but failed to show at a key hearing, was held personally liable along with his business.

Jobless Benefits Tougher to Get: Anecdotal evidence suggests Connecticut's unemployment compensation administrators are looking more closely at unemployment compensation claimants, and disqualifying some in circumstances where the result might have been different in better economic times. As an example, a recent decision confirmed the denial of benefits to a claimant who refused a job offer that would have required a 23-mile commute. One reason for scrutinizing claims may be that the unemployment insurance trust fund will be $100 million in the red by the end of 2009. Another is that work search requirements are tougher for a claimant seeking extended benefits after exhausting regular state and federal benefits.

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