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Cops Beat the Rap, Then Sue the City

Being a police officer isn't easy, especially when you get fired, and even prosecuted, for doing what one could argue you were hired to do, namely going after bad guys. But sometimes cops manage to turn the tables in a big way. Two recent examples from Hartford prove the point.

Detective Robert Lawlor was working on a case involving drugs and guns when he shot two young men, killing one of them. Officers recovered drugs, but no guns were ever found. When prosecutors decided the shooting was not justified, Lawlor was charged with manslaughter. While the case was pending, he took early retirement, but thereafter was found not guilty.

A Connecticut statute provides that when a police officer is charged with committing a crime in the course of his duty, if the charge is dismissed or he is found not guilty, the officer "shall be indemnified . . . for economic loss sustained by him as a result of such prosecution, including the payment of any legal fees necessarily incurred." Now Lawlor is suing the City of Hartford for over $700,000 in legal fees, plus lost wages, overtime, sick and vacation time, and pension credits from the date of his arrest until his retirement.

Coincidentally, at about the same time, another Hartford police officer was awarded almost $600,000 in damages under similar circumstances. Officer Robert Murtha was suspended without pay after shooting a fleeing suspect. He claimed he fired because the suspect brushed him as he sped away in a car, but videotape evidence showed the car never struck him. Although he was charged with assault, he was later acquitted. Like Lawlor, Murtha sued after the City refused to make him whole for his losses.

But Murtha's demands didn't end there. He also has a grievance pending before the State Board of Mediation and Arbitration in which he seeks reinstatement as a police officer. While the question of whether he committed a crime is not the same as whether he deserves to be returned to duty as a police officer, the SBMA tends to be pro-employee when it comes to issues like this.

Our opinion is that the statute in question puts municipalities in a no-win position. If they defend a police officer accused of a crime, the public suspects a cover-up. If they don't, they may be faced with hundreds of thousands of dollars in damages. This is a particularly difficult dilemma where, as in the Hartford cases, there is a racial element involved because the officers are white and the victims of their alleged crimes are not.

Employment Practices Liability Insurance: Buyer Beware

Given the proliferation of statutory and common law employment claims in the workplace over the past few decades, it's not surprising that Employment Practices Liability Insurance (EPLI) has gotten to be a big business. Since it is often sold as part of a business insurance package, some employers may not even know that they have it. However, it's a good idea if you do have it to look at the fine print carefully.

For example, many policies require that counsel selected by the carrier must be used to defend claims. Naturally, the carrier will often select the lowest priced attorneys to do the work, which may not give the employer much comfort if the case is a difficult one, the attorneys are not familiar with their business, or the employer already has an established relationship with employment counsel. Even if the carrier allows the employer to choose defense counsel, it will usually reserve the right to approve the employer's choice, the rates that the employer's counsel can charge, and the specific tasks it will pay for. Many law firms won't work under these constraints.

This all seems particularly inappropriate where the policy has a high five-figure or even six-figure retention (deductible), since most employment cases are settled or disposed of for far less than that. In such cases, the EPLI carrier never has any exposure at all.

One recent case shows why it's important to read all the fine print in the policy. A Connecticut employer tried to get its EPLI carrier to defend an employment lawsuit brought while the policy was in effect, but to no avail. It seems the employee had been terminated before the policy went into effect, and had contested his denial of unemployment compensation benefits through the usual DOL procedures. The carrier said the employer had not disclosed this "prior administrative proceeding" when it submitted its application for coverage, and therefore it had no duty to defend this "related case." The Connecticut Supreme Court analyzed the fine print in the policy, and agreed.

Our advice to clients is to make sure your insurance agent or broker knows what your needs and expectations are before signing you up for EPLI coverage. There are choices in the marketplace, and the time to exercise whatever leverage you may have in fixing the terms of the plan is before you buy. Once a plan is in place, don't expect the carrier to work with you in handling a case other than strictly in accordance with the fine print.

Fighting Information Overload: We're On Your Side

If you're in human resources, it seems like every day someone is telling you about a new development you have to know all about immediately. Usually, of course, the message comes in the context of an invitation to a seminar, a pitch for a publication, or a 50-page outline from a law firm marketing its expertise in the area.

However, in many cases you don't really have to learn everything there is to know about an issue, or at least to learn it immediately. A good example was the blizzard of programs a few months ago about the Employee Free Choice Act, the card check legislation that now seems dead in the water, and is unlikely ever to become law, at least in its original form.

The best current example is the recently passed health care reform legislation. Law firms and seminar mills seem to be falling all over themselves to be the first to educate you on this incredibly complex legislation. Cooler heads, including those at Shipman & Goodwin, point out that many aspects of the new law are not yet fleshed out, important terms are not yet clearly

defined, and even knowledgeable experts are not sure how various provisions will work in practice. Large sections of the legislation are not even of interest to most employers, because their impact is limited to providers or insurers. Perhaps most important, with few exceptions, the earliest date a typical employer will be affected by the new law's provisions will be January 1, 2011.

Our plan is to resist the temptation to participate in the marketing frenzy, to work through these issues as they become clearer, and to provide clients and friends with practical advice about what they really need to know when they need to know it. Our preliminary summary of the items that will impact employers within the next year or so has gone out electronically, and is available on our website. It's a lot more manageable than the voluminous materials you may have seen from other sources. Meanwhile, if you have any specific questions or concerns, you may contact any Shipman & Goodwin attorney.

Now We've Seen Everything...

Sexually tinged comments by men about women (and sometimes vice versa) in the workplace are a reasonably common personnel problem. Most of us also know that even male-on-male or female-on-female harassment can be illegal, at least if it is sexual in nature. But a recent federal court decision from New York pushes the envelope beyond anything we've seen before.

A well-endowed female technician in a Verizon office was the subject of regular jokes by female co-workers about her breast size. When she complained, and an investigation concluded that no unlawful gender discrimination had occurred, the kidding intensified. Women in the office made "love-making" noises over the intercom, stuffed their bras and pretended to be the complainant, on one occasion pulled open her shirt, and repeatedly asked if she had undergone enhancement surgery. She left her job and brought suit after many more complaints went unanswered.

Verizon argued that the alleged harassment was not "because of sex," but the court said if the actions of the harassers were based on the plaintiff's breast size, it didn't matter whether they were motivated by sexual interest or not. "In a professional workplace, breasts are the most obvious and easily observable representation of gender." Therefore, harassment based on breast size is harassment "because of sex," which constitutes sexual harassment.

It's a safe bet this case won't make it to the Supreme Court!

Legal Briefs *and footnotes...*

Retiree Benefits Can Be Cut: Some time ago we reported on a federal court decision upholding an arbitration award resulting in reduced pension benefit accruals for future years of service by Waterbury firefighters. More recently, that decision was affirmed by an appeals court. In a related development, Rhode Island legislation cutting health insurance benefits for future retirees was upheld by a federal judge. In the face of growing government efforts to exercise fiscal responsibility to curtail unsustainable public employee benefits, public employee unions continue to fight to preserve what they won during better times.

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S&G Notes

In late April, we sent out an alert entitled *"Health Care Reform, What Employers Need To Know Now."*

If you did not receive the alert noted above and you wish to sign up for our email list, contact mramsay@goodwin.com. Membership on our email list will ensure that you receive alerts such as the one above as well as invitations to all of our Labor and Employment seminars.

Electronic Monitoring Challenge Fails: When Bridgeport fire inspectors were disciplined for shirking their duties based on evidence gathered from GPS devices placed in their City-owned vehicles without their knowledge, they sued. Their argument was based on a state law requiring employers to notify workers of electronic monitoring in the workplace. We previously reported on the trial court decision to the effect that monitoring in vehicles is not covered by the statute, because it is not on the employer's premises. The Connecticut Supreme Court has upheld that decision, but on different grounds. The high court found there was no private right of action created by the electronic monitoring law.

Foxwoods Dealers Get Contract: Most people have forgotten that a year or more ago, the UAW agreed to abide by Mashantucket Pequot tribal law in its drive to negotiate a collective bargaining agreement covering 2,500 dealers at Foxwoods Casino. The result, according to press reports, is a two-year contract that raises wages by 12%, and includes other benefits such as more sick leave, improved job safety and security, and standard union contract provisions such as seniority and grievance procedures. The union claims this outcome paves the way for contracts at other Indian-owned casinos.

Take Overtime Issues Seriously: In our last issue, we reported on a lawsuit against AT&T that started with a Wethersfield resident who claimed she was incorrectly classified as a manager exempt from overtime requirements. The consequences of such mistakes are exemplified by a settlement of nationwide claims against Staples by assistant store managers who alleged they were improperly denied overtime. The settlement totaled $48 million, and that was on top of a similar settlement in 2007 of $32 million for Staples employees in California alone.

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