Employment Law Letter

Spring 2009

Financial Firm Learns USERRA Has Big Teeth, and Bites!

With thousands of U.S. troops returning from the Middle East, and tens of thousands more due to follow in the next few years, fitting them back into today's diminished workforce will not be easy. However, companies that fail to comply with the requirements of the Uniform Services Employment and Reemployment Rights Act (USERRA), by not rehiring former employees in the same or a similar position when they return from active duty, may be hit with big damages.

A Stamford financial advisor with a six-figure income from Prudential Securities was one of the first Air Force reservists called up after 9/11. When he returned in 2003, he was offered an entry level job in the Westport office of Wachovia, which had absorbed Prudential, at a small fraction of his former pay. His former clients had been reassigned to someone else, and he was relegated to making cold calls. He declined the offer, and sued.

This March, a U.S. District Court judge awarded the plaintiff his old job back plus $1 million in back pay, interest and liquidated damages. The judge said Wachovia also had to pay his attorneys fees, which will likely add several hundred thousand dollars to the total. This may be the largest award ever in a USERRA case.

While it may be a significant burden on employers, especially in these difficult times, Congress gave returning servicemen and women very broad job protection. As long as a soldier returns within five years and gives the employer notice within a few months of coming home, he or she must be reinstated to the former position, unless the employer can

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prove that, even if the employee had never left, the job would have been eliminated and the employee laid off in the interim.

Our advice to employers is not to risk litigation over USERRA claims unless there is an ironclad defense. Returning service personnel are naturally sympathetic plaintiffs, and the negative publicity just isn't worth it, even if you win.

Alcoholism Is a Disability But Not a Defense

Employers are so conditioned to look for circumstances that might put an employee in a protected classification that they sometimes overreact, and assume that just because an employee is in a protected class, they can't take normal disciplinary action. A classic example is alcohol abuse.

By now most employers are well aware that alcoholism is a disability protected by the ADA. But that doesn't mean that alcohol related misconduct can't be punished. To cite the clearest case, an employee who drinks on the job may be subject to discipline or discharge, regardless of whether he is an alcoholic or is simply celebrating his favorite team's latest victory. The same would be true of a nurse who steals painkillers from a hospital. It doesn't matter whether she is selling the drugs to others or feeding her own habit.

The latest illustration of this principle involved a boiler operator at a power plant in New Haven. A long-time alcoholic, he was suspended after a "no call/no show" incident caused by drinking, and terminated after a second similar incident a few weeks later. He sued his employer, claiming he was terminated due to his alcoholism, in violation of the ADA. Not so, said the judge. He was fired after repeated violation of a valid and uniformly enforced company rule requiring notification of a supervisor on the day of an absence.

There are other personnel issues where similar logic applies. For example, you can't fire someone because they have filed a workers' compensation claim, but if they have been out of work for an extended period with no reasonable prospect of returning in the foreseeable future, they certainly can be terminated and replaced if that is what legitimate business considerations call for. If the employee would have been terminated if the injury had occurred at home, the workers' compensation laws do not require a different result.

Our advice in substance abuse situations, however, is that if an employee comes forward and admits to having a problem before committing a discharge offense, at least one attempt should be made to get help for him or her. If that involves, for example, a 30-day leave for inpatient treatment, an accommodation should be made. Subsequent relapses, of course, may call for a less sympathetic response. It can even be argued that the employer is enabling the employee's bad behavior if there are no consequences for it.

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Supreme Court Restores Greenwich Police Promotion

In a major victory for the Town of Greenwich and supporters of management rights, the Connecticut Supreme Court has overturned a trial judge's decision that displaced the Town's choice for a promotion to police captain in favor of another applicant who scored one point higher on the exam. The case turned in large part on the significance of a "past practice" clause in the police union contract.

Captains are not part of the police bargaining unit in Greenwich, and the contract simply states that candidates for captain positions must be bargaining unit employees who are certified to the promotional list. The Town's own policies and procedures appear to allow it to select any qualified applicant on the list. However, a string of witnesses testified in the trial that the Town had always selected the candidate who scored highest on the promotional exam. That plus a contract clause that said prior practices would control working conditions not specifically addressed in the agreement convinced the trial judge that the top scorer should get the job.

The Town appealed, asserting that it had the right to choose its own management team, and that the trial judge ignored the results of interviews with the police chief and the first selectman, who were part of the promotional procedure. By a 3-2 vote, the Supreme Court agreed. Key to their reasoning was a finding that while a past practice clause may be determinative with regard to conditions of employment on which a union contract is silent or ambiguous, it plays no role when it comes to issues that are not mandatory subjects of bargaining. The procedure for filling positions outside the unit is only a permissive subject.

The narrow reversal cost the plaintiff $74,000 in back pay awarded by the trial judge, plus about a quarter of a million dollars in attorneys fees the trial judge had ordered the Town to pay. The Town not only won the right to retain their chosen candidate for the position in question, but narrowed the application of the contract's past practice clause in a way that could help them (and many other employers) in the future.

Note: The Town of Greenwich was represented by Shipman & Goodwin LLP.

Connecticut Law on Bonuses Draws National Attention

At the center of the recent national uproar over millions of dollars in bonuses paid to AIG executives was a little known and even less used provision of Connecticut's wage and hour laws that authorizes double damages as a penalty for an employer's failure to pay "wages." Everyone from Attorney General Blumenthal to any employment lawyer who could find a microphone or a reporter weighed in on the question of whether or not AIG's retention bonuses constituted wages for purposes of the penalty provision. The answer to that question is not as clear as some commentators might wish.

What is clear is that an entirely discretionary employer gratuity, as in "we've had a good year so everyone gets a $1,000 bonus," does not constitute wages. Equally clear is the fact that a bonus for an employee's personal productivity or performance does constitute wages. The area in between these extremes is more gray than black or white. A bonus for staying at work through a certain date has been held to constitute wages, but the

same probably would not apply to an annual bonus that every employee gets just for remaining employed for another year.

Without knowing all the facts and circumstances, it's anybody's guess how the Department of Labor would rule on the AIG bonuses, and it's not clear that anyone has asked them. Even assuming the employees in question contributed to the current economic meltdown, that doesn't necessarily mean their bonuses can be withheld. Similarly, the fact that AIG took federal money isn't determinative, unless Congress prohibited such payments, which apparently it did not.

Then there's the troublesome fact that these bonuses were apparently promised in writing well in advance, so recipients were counting on them. Even if the double damages provision didn't apply, there could be a breach of contract claim if the bonuses weren't paid. It may be that AIG can be faulted for not more aggressively pursuing possible arguments for reducing or withholding the bonuses, or at least not raising the issue with the DOL. However, any suggestion that AIG could have withheld the promised bonuses with impunity is open to serious question.

Our opinion is that financial firms have brought some of the furor over excessive bonuses on themselves. Many people who work on Wall Street couldn't rent a decent apartment in Manhattan with their base salaries; they count on their "bonus" to survive. If bonuses were capped at some fraction of base salaries, that would force financial firms to set reasonable salaries based on what an average employee is worth, and calculate bonuses so as to reflect the additional value of exceptional performance, whether individual or collective.

LEGAL BRIEFS
. . . and footnotes

Misclassification Claim Fails: Last fall we wrote that employers characterizing employees as independent contractors, or claiming salaried exempt status for employees who don't qualify for it, remained a big problem. One example was a group of wrestlers suing World Wrestling Entertainment for treating them as independent contractors. Now a federal judge has thrown out their claims. They all signed contracts confirming their status long before the lawsuit was brought, and the statute of limitations had expired. WWE's lawyer quipped, "These are big guys who signed big guy contracts."

Lunch Hour Injury: Recently we reported on a workers compensation claimant who was at first granted benefits for an injury suffered when she fell while walking on her employer's grounds during her lunch hour, then was denied benefits by the Compensation Review Board because her injury did not arise in the course of her employment. Now the Appellate Court has affirmed that result, but on different grounds. The judges said the injury arose in the course of her employment, because it was reasonably necessary to her personal comfort at work. However, benefits were denied under the "socio-recreational exception," which the judges found applicable to exercise for the purpose of personal relaxation or enjoyment, whether in the form of a company softball team or a solitary walk.

Waterbury Firefighters Lose: Under the threat of arbitration governed by a State Oversight Board, the Waterbury Fire Union agreed to a contract under which pension benefits were reduced. Normal retirement was changed from 20 to 25 years, and the pension multiplier was reduced from 2.5 % to 2.0% for each year of future

service. Several firefighters claimed this violated their constitutional rights, because they were "vested" in the richer benefits. A federal judge has now thrown out their claims. After all, if their argument were sustained, collective bargaining (at least over pensions) could only result in benefit increases, not decreases. The City was represented by Shipman & Goodwin LLP.

Day of Mourning Denied: South Windsor employees have a clause in their contract granting a paid day off for any "day of mourning or celebration" declared by federal, state or local government. When the governor declared May 2, 2007 as a day of mourning and remembrance for a council member who died a few days earlier, AFSCME demanded a paid holiday. When it was denied, they went to arbitration. The panel majority said the contract was intended for more momentous occasions. In this case, for example, the Governor only made the proclamation on the morning of the day in question.

Union Avoidance Effort Fails: A South Windsor wholesaler recently learned a lesson in how not to avoid a union. When the employees of a contractor that ran the wholesaler's distribution decided to unionize, the wholesaler took over the operation itself. It made job offers to 15 of the contractor's employees and 16 new hires, presumably to avoid giving the union majority status. The trouble started when 4 of the 16 new hires refused the offers. Then the union went to the NLRB, which persuaded a federal judge to issue an injunction requiring the wholesaler to recognize and bargain with the union. He also ordered the wholesaler to hire several of the contractor's employees who he said had been denied jobs because of anti-union discrimination. Although the wholesaler has the right to contest these findings through a full NLRB trial, the injunction seems to make that a waste of time and money.

Some Arbitrators Excuse Anything: What does it take to sustain a discharge? A corrections officer was fired after repeated and outrageous harassment of a co-worker he believed was gay. A commissioner testified that this was the most egregious violation of the Department's policy of "zero tolerance" for sexual harassment she had ever seen. However, the arbitrator thought the discharge was overly harsh, and ordered the perpetrator reinstated. A Superior Court judge disagreed, and overturned the award as a violation of public policy. This was the same arbitrator who ordered the reinstatement of another state employee after he sent racist messages to a state legislator. That award was also overturned.

More Employment Law Changes: In our last issue, we summarized changes in ADA, FMLA and I-9 requirements that became effective in the first few months of 2009. Now there's a new crop of changes that HR professionals should know about:

- The Lily Ledbetter Fair Pay Act, effective May 28, makes it easier for employees to bring lawsuits based on the present effects of past discriminatory decisions about pay rates.
- New Executive Orders affecting federal contractors and subcontractors disallow costs associated with efforts to dissuade employees from unionizing, require the posting of a notice regarding employee rights under federal labor law, and encourage the use of "Project Labor Agreements" on federally funded construction projects.
- COBRA changes designed to assist those laid off in the current downturn are part of the Economic Stimulus Package enacted by Congress.
- The US DOL will focus enforcement efforts on misclassification of workers as exempt from

overtime pay, and state authorities have targeted improper use of independent contractor status, especially in the construction industry.

More information about these developments is available from any member of our firm's Labor and Employment Law Department.

S&G Notes: About 120 clients and friends attended our spring seminar on labor and employment developments on April 3 at the Farmington Marriott.

Recent S&G Website Alerts:

President Obama Signs Equal Pay Law, 02/09

Concessions, Cuts and Public Sector Bargaining, 02/09

Use of New I-9 Form Required, 03/09

Connecticut FMLA Complicates Compliance With Federal Law, 03/09

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