ROUTE TO: _____ _____ _____

Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

WINTER 2004

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.

- **No-Rehire Policy:** The U.S. Supreme Court has ruled that an employer policy against rehiring employees terminated for violating workplace rules is not illegal, even though it may have the effect of denying employment to a recovering drug addict. A lower court had said such a policy violates the ADA.

- **Joint Employers:** Separate companies under common control may be treated as a single employer for purposes of computing overtime pay due workers performing services to both entities. According to the federal appeals court with jurisdiction over Connecticut, the same may be true in situations where a primary employer uses one or more subcontractors to perform services closely integrated with the employer's own operations.

- **Reporting Rules Delayed:** A federal judge has delayed for a year the effective date of new regulations requiring detailed financial reports from labor unions. The judge said allowing only about two months for labor organizations to gear up for the new rules did not satisfy due process.

- **"Supervisor" Defined:** Last year we reported on a federal court decision from the second circuit expanding the definition of "supervisor" in the context of a sexual harassment claim, to include a co-worker whose power to assign work or exercise other authority enabled him to create a hostile work environment. The U.S. Supreme Court has now declined to review that decision, effectively making it the law.

Malicious Treatment of Workers Can be Costly

In most cases, employers are free to make whatever decisions they want about their employees, as long as they aren't illegal or in violation of the employee's legal rights. The decision may be right or wrong, good or bad, but won't have legal consequences as long as the employer is acting in good faith.

The rules change, however, when the boss is out to get the worker. A good example is a recent federal court decision involving a Killingworth company that terminated an employee in a "reorganization" where she was the only worker affected. A few weeks earlier, she had called the Labor Department after being denied the opportunity to work half time for a few weeks as recommended by her doctor when she was recovering from surgery. Though the company reversed its decision after being apprised of its FMLA obligation to provide this accommodation, she overheard an executive tell her manager to "get rid of her".

A jury verdict of $141,000 was doubled under an FMLA provision allowing liquidated damages. The federal magistrate who ruled this provision was applicable cited testimony from the trial in which a co-worker quoted a company executive as saying the plaintiff should not have challenged the original decision, since "nobody questions Larry," the company's CEO.

In another recent employer setback, a state court jury awarded an account clerk a $65,000 verdict plus $40,000 in punitive damages after she received two stinging reprimands from her boss, the East Haven Police Chief, which the jury found to be malicious and damaging to her professional reputation. The case is significant because the plaintiff was not terminated, demoted, transferred or otherwise financially harmed, so the six-figure verdict covered only emotional distress and damage to her reputation.

The key to these awards was a finding that the employer acted maliciously. In general, even statements highly critical of an employee's performance are not actionable. For example, statements by another Connecticut employer to the effect that a worker was being dismissed "as a result of your dishonest acts including lying, attempted extortion and blackmail" were found not to be actionable, because they were made to the employee herself and in the defense of an unemployment compensation claim, and

were based on the employer's honest perceptions. However, the fact that the employer prevailed in the unemployment compensation proceedings was not sufficient to defeat the employee's wrongful discharge claim.

OurAdvice to employers is to say as little as possible about a departing employee, except to the worker him/herself, his/her union, lawyer or other representative, and of course the unemployment compensation administrator.

Arbitration Produces $3.1 Million Award

Many employers prefer arbitration to litigation because it is perceived as faster, less expensive, and most importantly because it eliminates the risk of an inflated award by a runaway jury. Maybe so, but arbitration awards can be expensive, too.

When an employee of Cantor Fitzgerald was suspended for the last full year of his contract, with his base salary but no bonus, he brought a claim that was subject to the mandatory arbitration policy of the National Association of Securities Dealers. They found in his favor, and awarded him the bonus he would have received if he hadn't been prevented from working. However, that was just the beginning.

Concluding that the bonus constituted "wages" for purposes of applying the wage payment provisions of Connecticut law, the arbitrators awarded double damages and attorneys fees. Rejecting an argument that this remedy constituted "punitive damages," which are generally not permitted in arbitration, the court to which the employer unsuccessfully appealed held that since this remedy was specifically authorized by Connecticut law, such damages are "remedial" in nature. The total award, which the court affirmed, was $3.1 million. Not bad for a year of sitting home on suspension with pay!

Our advice is still to go with arbitration instead of litigation whenever possible. Presumably the arbitrators in this case wouldn't have thrown the book at Cantor Fitzgerald unless they felt the employee had been badly mistreated. Under such circumstances, a jury might have awarded the plaintiff an even larger amount.

Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

is published quarterly as a service to clients and friends by the firm's Labor and Employment Law Department, with the cooperation and assistance of the Litigation Department and Employee Benefits Group. The contents are intended for general informational purposes only, and the advice of a competent professional is suggested to address any specific situation. Reproduction or redistribution is permitted only with attribution to the source.

Domestic Partner Benefits Revisited

In 1999, arbitrator Roberta Golick ruled in an interest arbitration case that 50,000 state employees were entitled to health insurance for domestic partners who were of the same sex, and who therefore could not marry. Thereafter, a female state employee complained to the CHRO that she was not entitled to insurance benefits for her male partner, and that she was therefore a victim of discrimination based on sexual orientation and marital status.

Presiding human rights referee Gordon Allen recently dismissed the case because of lack of jurisdiction. He pointed out that SEBAC, the state employee bargaining coalition, originally sought domestic partner benefits for both same sex and opposite-sex partners, but dropped the latter from its last best offer submitted to the arbitrator. He said to grant the plaintiff's request would essentially confer the same benefits the unions waived in arbitration, which would subvert legislative policy as reflected in the state employee bargaining laws.

Our opinion is that the unions may go to court over this issue, but decisions in other states have upheld distinctions between benefits for couples who can marry and couples who can't.

Taking Free Food: A Firing Offense?

The discharge of a 27-year security guard at the Pratt & Whitney facility in Middletown is attracting a lot of media attention, even though it happened more than a decade ago. The guard, who is black, was fired after admittedly accepting free food from a cashier who was grateful for some favors he had done for her. His race discrimination claim took years to find its way through the system, but has finally been cleared for trial by a federal judge.

She denied Pratt's motion for summary judgment, pointing to evidence of disparate treatment. Two co-workers claimed there was a widespread practice of accepting free or discounted food at the facility, and various white co-workers were not disciplined for similar offenses. One white worker had been fired for stealing food, but had been reinstated through the union grievance procedure.

Pratt did have a policy against accepting gifts from those doing business with the company, but had recently added an exception

continued on page 4

LEGAL BRIEFS
and footnotes

Heroes of 9/11? Apparently not all firefighters are unselfish heroes. Take the East Haven firemen who demanded overtime for their regular shift on 9/11 because non-essential town employees were dismissed early, and a few got overtime when they were called back for emergency duty. Or take the Bridgeport fireman who was hurt while covering for a lieutenant, and demanded lieutenant's pay while on injury leave. In recently reported arbitration awards, both claims were rejected.

Wyman's Aide: The executive assistant to State Comptroller Nancy Wyman made a TV appearance during her election campaign for Treasurer of the City of Hartford, in which she commented that she and Wyman often shared ethnic jokes about the assistant's Hispanic heritage. For example, when they were late for a meeting, they might refer to being "on Puerto Rican time." Wyman wasn't amused, and fired her. Though the assistant claimed this violated her first amendment rights, a Superior Court judge ruled her speech had nothing to do with a matter of public interest, and was only intended to advance her political career. Her position in the Comptroller's office required judgment, discretion, and personal loyalty, which her comments showed she lacked.

Unreasonable Profits: During a 1998 strike by the Communications Workers of America, SNET actually made more money than it did before and after the strike, presumably because of lower payroll costs. The DPUC said SNET should refund $1.8 million to its customers under a state statute that prohibits utilities from pocketing "unreasonable profits" because of a strike. Now a Superior Court judge has struck down that ruling, deciding that the legislature only intended to prevent utilities from reaping a higher rate of return during strikes than the maximum permitted under a formula established by law. In 1998, that rate was 9.92%, and SNET's profits during the strike did not exceed that amount.

Fraud Not Fatal: When a Connecticut company terminated its CEO, it agreed to pay over $300,000 in severance benefits. However, it stopped making payments when it discovered the former CEO had falsely claimed he was still employed by the company when he applied for a mortgage. A judge ruled this alleged fraud was not grounds for terminating the severance benefits, since the former CEO became entitled to those benefits upon termination. The company was ordered to pay the balance of the severance, plus 10% interest.

Technical Foul: Some arbitrators will seize on any technicality to justify reversing or reducing employee discipline. For example, Arbitrator Ruben Acosta recently reinstated an Ansonia police officer who made vulgar sexual advances to three different women in a little more than a year, because he didn't get timely notice of one of the women's complaints. Arbitrator Susan Halperin reduced the termination of a corrections officer for sleeping on the job to a one-month suspension for "inattentiveness." Although his supervisors pounded on the window of a locked truck for several minutes while the employee did not respond, they failed to call his name, and when he finally responded, they failed to ask if he had been sleeping, two steps which the arbitrator said were required by protocol.

No Self-Defamation: Our Supreme Court has declined to recognize a cause of action for "compelled self-defamation" in Connecticut. The case involved an employee fired for failing to return to work after an injury. He sued because he was forced to tell prospective employers why he was fired, and in doing so was defaming himself because in fact his doctor had okayed a delayed return date. The justices said that recognizing such lawsuits would create havoc in employer-employee relation ships.

How Long is a Day? The state has long paid personal days and holidays based on a regular day (usually 8 hours), even if the employee works four 10-hour days. Now the Connecticut Supreme Court has ruled that "day" means whatever hours the employee regularly works. Rejecting arguments that this means employees working fewer but longer days get more paid time off than other workers, the court pointed out that the state's practice means employees have to use vacation time to supplement personal days or holidays in order to get a full week's pay.

Promise Worth $850,000: A top performer in a relocation services firm was assured by her supervisor there would be "no problem whatsoever" if her husband, who had lost his job with the same firm in a reorganization, took a position with a competitor. When he did so, however, her duties were restricted and she was eventually fired. Our Supreme Court recently upheld an $850,000 jury verdict in her favor, based on the principle of promissory estoppel. This doctrine applies where there is no formal contract, but on party makes a promise on which the other party relies to his/her financial detriment.

Tribal Justice: Mashantucket Pequot courts don't hesitate to uphold the discharge of casino workers, even under circumstances where many employers might not have made the same decision. In one recent case, a stage manager at Foxwoods was fired after being arrested when marijuana was found in his home. In another, a cage supervisor was fired after failing to report a $25 chip found in one of the cages, even though she claimed she forgot it was in her pocket. Some employers might think twice about firing workers with good records based on off-duty conduct, or an incident that may or may not have been intentional petty theft.

Shipman & Goodwin Notes: Our firm's annual seminar for public sector employers will be held on May 6. Invitations will go out soon . . . Sexual harassment training is being offered by the firm's employment attorneys on April 15 in Stamford and April 16 in Hartford.

for “gratuities of nominal value,” such as meals and refreshments. The incident which led to the discharge of the guard involved not paying for a hot dog and a bottle of water.

Our advice is that before terminating an employee for such petty pilfering, an employer had better have a clearly established and consistently applied policy prohibiting such conduct. Coincidentally, at about the same time as the Pratt & Whitney decision, a Superior Court judge upheld an unemployment compensation award to an employee who, along with co-workers, drank a case of free soda delivered to the employer as a gift from a vendor. While it may have been poor judgment, it was not willful misconduct, the judge said.

FLSA Exemptions Lead to Lawsuits

Some employers don’t exercise appropriate care when drawing lines between exempt and non-exempt workers, so they shouldn’t be surprised when someone complains and they are presented with a bill for unpaid overtime. Many more, however, do their best to comply, but are understandably confused by the maze of regulations applied by state and federal labor departments.

While the Bush administration and Congress squabble over proposals to simplify the rules, some companies wind up in court over the status of specific jobs. A photography firm recently prevailed in two such disputes. They involved claims for overtime by the manager of a photography studio and an artist who used digital techniques to enhance photos. A Connecticut judge ruled that both were properly classified as exempt.

The studio manager met both the administrative and managerial exemptions because she supervised and disciplined other employees, interviewed applicants, signed contracts, planned advertising, and decided when to provide gift certificates to good customers. The artist met the professional exemption since her primary responsibilities involved imagination, invention, artistic talent, and professional judgment.

Our opinion is that while the employer deserved to win this case, nothing is certain in this area of the law, and the administrators responsible for enforcing the rules are often more sympathetic to employees than the courts are. For example, the judge in this case seemed influenced by the fact that the two employees had worked on a salaried basis for an extended period without complaining, which most wage and hour investigators would deem to be irrelevant.

.

Shipman & Goodwin LLP
COUNSELORS AT LAW
One American Row
Hartford, CT 06103-2819