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Shipman & Goodwin LLP

EMPLOYMENT LAW LETTER

FALL 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.

- **Grad Students Can't Unionize**: In yet another significant reversal of a prior position, a divided NLRB has ruled that graduate students who serve as teaching assistants, research assistants or proctors "have a predominately academic, rather than economic relationship with their schools," and therefore are not employees entitled to collective bargaining rights. In a case involving Brown University, the majority of the Board voted to overturn a four year old decision concerning New York University, and return to the principles expressed by the Board in 1974, when a similar group at Stanford University was found to be primarily students, not employees. At Brown, the grad students generally received the same amount of funding regardless of how many hours they worked, and it was characterized as financial aid rather than wages.

- **New FLSA Rules Still Standing:** The US Department of Labor regulations that went into effect August 23rd are still in force, despite action by Congress to block them. In separate bills, the House and the Senate have voted to deny funding for enforcement of the new rules, or at least those provisions that could deny overtime pay to employees who previously were eligible for it. The bills have been sent to a conference committee, which is charged with harmonizing the two proposals, but the committee has not acted yet. Some observers believe such action is unlikely until after the presidential election. Meanwhile the DOL is applying the revised regulations, and labor and management groups continue to differ over their ultimate impact on the number of workers entitled to overtime pay.

Unions Can't Solicit In Crystal Mall

The United Food and Commercial Workers were turned down by the Connecticut Supreme Court when they attempted to challenge a decision by the owners of the Crystal Mall in Waterford to deny them access in order to distribute union literature. The justices ruled that action by the mall owners was not "government action" for purposes of determining whether the Union's free speech rights were violated.

The Union pointed to extensive government involvement in permitting, regulating and policing the mall, but the court said these factors did not convert private action into public action. Further, the fact that the public is invited does not mean the mall cannot regulate the conduct of visitors. The court agreed with the Union's argument that it was easier to demonstrate state action under Connecticut's constitution than under the U.S. Constitution, but concluded that even under this more lenient standard the union could not prevail.

Some states have enacted legislation permitting certain types of political or other activity in malls, in recognition of the fact that their role in society has gone beyond purely commercial interests, but Connecticut is not among them. There was also a precedent for the Crystal Mall decision in a 1984 case involving Westfarms Mall, where the National Organization of Women was denied access for the purpose of soliciting shoppers.

The same union involved in the Crystal Mall case made a similar claim in the early 1990's, but on a different theory. They argued that the National Labor Relations Act allowed union organizers access to places like the parking lot of the Lechmere store on the Berlin Turnpike, because employees have an interest in being informed about their right to unionize. Although the NLRB agreed, the U.S. Supreme Court rejected that claim, and held that private property rights are only trumped by the right to unionize when employees live on the employer's premises.

Our opinion is that we haven't heard the last of this issue. Malls and other large commercial enterprises are taking on an ever-larger role in our society, and given the shrinking base of private sector unionism in the U.S., labor organizations can't afford to concede this battleground to the forces of capitalism.

Call-In Pay Starts When Employee Reports

Connecticut law mandates that when an employee is called in from off duty status, he must be paid from the time he "is notified of his assignment." Most employers have interpreted this requirement to mean he is on the clock as soon as he receives the call. The Town of Tolland, however, recently convinced a Superior Court judge that at least in certain circumstances, the clock doesn't start until the employee reports to work.

The case involved a town maintenance employee called in to respond to a snow storm. The municipal employer argued that while the employee knew the general nature of the required work when he was called, he wasn't given his specific assignment until he reported for work, and therefore he wasn't entitled to be paid for travel time.

The judge agreed. He found there were a variety of assignments made during storms, and until supervisors went through the entire list of 23 employees to determine who was available to come in, they had no way of knowing which employee would receive which assignment. Further, he noted that the same statute on which the plaintiffs relied makes reference to the time an employee is "contacted" in a different context, which suggests the legislature must have intended to draw a distinction between when an employee is "contacted" and when he is "notified of his assignment".

The judge also noted that the plaintiffs' position could produce ridiculous results. What if one employee lives next door and reports to work immediately, while another lives far away and decides to shower and shave before driving to work? While the Labor Commissioner took the position an employee could only be credited with reasonable commuting time, the court noted there was no standard for determining what is "reasonable."

Our advice is not to assume the Tolland decision applies to all call-in cases. There are many such situations where an employee's call-in assignment is always the same, or where the employee is given the assignment when he is called, because there is no supervisor at the worksite. In such cases, it is probably still wise to assume that call-in pay starts when the employee answers the phone.

EMPLOYMENT LAW LETTER

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Teacher Indemnity Law Interpreted by Courts

The Connecticut statute indemnifying teachers injured in school assaults isn't used often, but there have been two cases interpreting that law reported just in the past few months.

In one case, a Hartford teacher requested compensation for injuries suffered when he was breaking up a fight between students. The school board moved to limit the teacher's claim to medical expenses and other out-of-pocket costs, objecting to money damages for pain and suffering, diminished earning potential, etc. Apparently this issue has not been addressed by the courts before.

A Superior Court judge ruled that if the legislature had intended to limit the scope of the statute to medical expenses, they could have done so. The problem with the school district's position, the judge said, was that if they were correct, the statute would provide no more protection than the worker compensation laws, and there would have been no point in enacting it.

The other case arose when a teacher at Area Cooperative Education Services (ACES) was injured by a student who jumped on his back for a piggyback ride. ACES argued this wasn't an assault. The court found that "assault" meant a violent and hostile attack, and ruled that the incident in question didn't qualify. After all, the teacher himself was heard to say shortly after the incident that the student was just "horsing around."

New Workplace Concept: Third Party Retaliation

Most employers know that a sure way to draw a charge or lawsuit from an employee is to retaliate against him or her for engaging in some protected activity. But can an employer get in trouble for penalizing an employee because of some action on the part of a third party? Breaking what is apparently new ground, one Connecticut judge says yes.

The case involved a woman who took a leave from a dental practice to undergo cancer treatments. While she was out, her adult daughter had problems with gum tissue grafts done by one of the dentists in the practice. The dentist turned over insurance

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LEGAL BRIEFS

and footnotes

Quit for Cause? Normally, workers are not entitled to unemployment compensation if they voluntarily resign. But there's an exception: they will collect if they quit for "good cause attributable to the employer." One recent example involved an employee who left after his employer hired a turnaround specialist who cut his pay from $20 to $15 dollars per hour. Another employee was initially awarded benefits when he quit after duties were added to his job as project superintendent. However, an appeals referee reversed that decision because the employee walked off the job without giving his employer a chance to discuss the situation and perhaps come up with some acceptable alternative.

Injured While Commuting: Normally, workers compensation doesn't cover injuries suffered by an employee on the way to or from work. However, an appellate court decision makes an exception where the travel is part of the service for which the worker is employed. Therefore, a home health care worker whose job is to visit multiple patients at their homes every day is entitled to workers compensation if she is injured in a motor vehicle accident between her home and her first visit of the day. It is not clear whether the same logic would necessarily apply if the accident had occurred on the employee's way home after her last visit of the day.

Public Policy Revisited: Not too long ago, it seemed the courts were more than willing to set aside arbitration awards, especially those involving a public employer, if they were inconsistent with "public policy." Now the pendulum may be swinging the other way. For example, a divided Connecticut Supreme Court recently upheld an arbitrator's reinstatement of a DMR employee who was fired for shoving a blind, mentally retarded patient into a chair, injuring his arm. The court said the arbitrator was justified in considering mitigating factors when considering the appropriateness of the penalty. A Superior Court judge also upheld the reinstatement of an employee of the Metropolitan District Commission who admitted to stealing from a customer's home while she was installing a new water meter. Even though the employer was a public utility, the judge said the arbitrator's action wasn't necessarily a violation of public policy, especially if the employee was not convicted of any crime. The stolen item? A magazine.

Religious Bias: We rarely see lawsuits alleging employment discrimination based solely on the worker's chosen faith, but there seem to be more and more disputes that arise because he or she insists on bringing it into the workplace. A Department of Mental Health employee who was also an ordained minister, recently failed to convince a CHRO referee he had been discriminated against because he was not allowed to use his religious title at work. The referee said the State had legitimate concerns about a violation of the constitution's Establishment Clause, and in any event the employer's decision did not constitute an adverse employment action. In another case, a Town of New Canaan worker sued the Town and his supervisor, alleging he was treated unfavorably because he often expressed religious views at work. Although that case is not resolved, the claims against supervisory personnel were dismissed. The court said supervisors were generally not personally liable under employment statutes.

Lime Rock Disability: In an unusual case, an employee of Skip Barber Racing School was injured at Lime Rock Race Track when a car driven by a student in a crash avoidance course went out of control and skidded 60 feet before striking him. Though he sued several parties, his employer was able to get itself out of the lawsuit by pointing to a waiver he had signed, exonerating the Racing School from liability for injuries suffered at a school sponsored event. Normally, waivers like that are not sufficient to avoid liability for future negligent acts, but this one specifically included, in capital letters, injuries caused by negligence. The court rejected the employee's claims that he didn't read or didn't understand the release.

Scout Leader Fired: A program leader for the Boy Scouts of America, who supervised a group of Cub Scouts that included his own son, was fired after he physically disciplined his son in front of the group. Although he sued on multiple grounds, none of them proved successful. He was an at will employee, so could be fired at any time. He didn't allege a violation of public policy of the type that would support a wrongful discharge claim. The claim that he didn't get to tell his side of the story was irrelevant, since the Boy Scouts are not a governmental entity required to follow due process. The employer's report of the discipline incident to DCF was privileged, and there was no evidence that anyone acted in bad faith. The court also dismissed allegations that the employer's actions damaged his reputation as an ordained minister.

Cop Caught DUI: A Colchester police officer was fired after being arrested for DUI while off duty, and having his license suspended for six months. His union claimed he was an alcoholic, and was entitled to treatment, not discipline. The Town pointed out this was his fifth alcohol-related offense. An arbitration panel sustained the discharge, pointing out this was the officer's second DUI conviction, and if he couldn't obey the law, how could he uphold it? Furthermore, there was no evidence he had sought treatment for alcoholism. Inexplicably, the labor member of the tri-partite arbitration panel dissented. Which part of "just cause" doesn't he understand?

S & G Notes: Our fall seminar on employment law developments will be held on October 28. For reservations, please call Sandra Swain at (860) 251-5315. We welcome the two newest members of our Labor and Employment Law Department, **Kevin Roy** and **Rebecca Rudnick.**

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money he received for the procedure in return for a release of the daughter's malpractice claim. However, when the employee made efforts to come back to work, her calls weren't returned, and she heard someone else had been hired to replace her.

When she filed a lawsuit alleging retaliation for her daughter's action, the dental practice moved to dismiss it, on the grounds that no Connecticut court had ever recognized a claim for "third party retaliation". The judge found, however, that this might be just the kind of case to establish such a principle. If anything, he said, retaliation that tends to infringe on the rights of an innocent third party might be even more egregious than retaliation that only involves the employee him/herself.

College Tenure Claims Must Follow the Rules

A well-publicized multi-million dollar verdict in favor of a Connecticut professor a few years ago seems to have spawned several lawsuits by professors denied tenure. The courts have been reluctant to substitute their judgment for the decision made by the school or college, however, especially when the institution has followed the rules while the professor has not.

Yale was sued by an unsuccessful tenure applicant, and the college recently prevailed because she didn't follow an internal appeal procedure. The logic was not dissimilar to that often used by courts where a union member bypasses a contractual grievance procedure and files a lawsuit.

The Connecticut Supreme Court said that tenure is a product of a school or college's own creation, and the handbook or other document setting forth the tenure process is in effect a contract. As such, if the employee wants the benefits of tenure, he or she has to follow the contractual path to achieve it.

The faculty member at Yale failed to pursue an internal appeal of her tenure denial, pointing out that the handbook said an unsuccessful tenure candidate "may" (not must) file an appeal. The court said this meant she could either appeal or not; it did not make the prescribed process optional. The court also rejected her arguments to the effect that the "exhaustion of remedy" doctrine should not apply to tenure cases, and that following the prescribed route would have been fruitless.

Our opinion is that since tenure decisions are life and death judgments in the world of higher education, those who are turned down often sue just because there is so much at stake. However, it is rare that courts will overturn judgments made by faculty peers, as long as they follow the rules established by the institution and demonstrate no bias against the candidate.

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