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Labor & Employment Law Department

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Are Courts and Arbitrators Getting Soft on Drugs?

With our General Assembly moving toward legalizing medical marijuana, and some other states decriminalizing possession of small amounts of certain drugs, it seems that firing employees for drug-related offenses is getting harder and harder, especially where the decision is subject to review by arbitrators.

A recent example involved a North Branford highway worker who twice failed to comply with the town's drug testing requirements, and as a result was fired from his safety-sensitive position. An arbitration panel converted the penalty to a suspension followed by reinstatement upon successfully passing a drug test. The town went to court, but the award was upheld at both the trial and appellate level.

The judges rejected the argument that reinstatement would violate public policy, based on a 2000 decision of the U.S. Supreme Court upholding two arbitration awards that reinstated a mining company truck driver who twice failed random drug tests and twice was fired for it. In that case, the justices found that reinstatement did not violate "an explicit, well-defined and dominant policy in either federal law or the DOT's implementing regulations."

Some time ago, we reported on a case in which the discharge of an Enfield police dispatcher who admitted to buying and using marijuana off duty was overturned by an arbitration panel. Though a trial court found that reinstating a police employee who violated criminal laws was in violation of public policy, an appeals panel disagreed, noting that there was no finding that the drug use actually affected the dispatcher's work or damaged the police department, and no evidence that the drug use was especially frequent or heavy.

That decision reflects a trend we have noted: appellate courts sometimes seem even less willing than lower courts to overturn the decisions of arbitrators. When arbitrators recently ordered reinstatement of a finance supervisor who was fired for allowing cash to be swapped for checks in a City of Hartford cashier's box, a lower court judge overturned that award, but an appellate court reinstated it.

Our advice is to consider the facts of a drug case carefully before deciding how to respond. A "one strike and you're out" policy, especially in the case of a less than egregious offense, may not stand up to challenge these days.

Jobless Benefit Eligibility Tightens

We have reported before on signs that the folks at the Employment Security division of the CT DOL may be getting a little more skeptical about questionable unemployment compensation claims. The evidence of that seems to be mounting.

Earlier this year, a claimant was given benefits after being fired for sending over 30 personal emails in a 24-hour period, despite multiple warnings not to use her work email for personal purposes. The employer appealed, the Referee sustained the appeal, and the denial of benefits stood up at the Board of Review and in Superior Court.

Shortly thereafter, an Appellate Court panel rejected a claim for benefits by a SNET worker who accepted an early retirement package because she feared a future reduction in medical benefits. At all levels of administrative review, it was determined that the claimant had "voluntarily left work without good cause," and was therefore not eligible for unemployment compensation.

One other recently reported decision follows this trend. A supervisor was terminated, even after being twice promoted, after it was discovered that he had falsified his employment application. When asked if he had been convicted of a felony within the past five years, he admitted to a DUI conviction but failed to mention forgery and larceny convictions. He was denied jobless benefits at all administrative levels, and his court appeal was rejected, because the falsification constituted willful misconduct in the course of employment, even if it occurred some time earlier, before his employment even began.

Our opinion is that with hundreds of decisions being made every day, administrators with the Department of Labor aren't going to get all of them right. However, it does seem that with unemployment compensation funds stretched thin, at least some claimants who once might have gotten benefits are walking away empty-handed. That's at least a little progress in the right direction.

I Have a Headache... But is it a Disability?

When the Americans with Disabilities Act was amended, among other things requiring courts to apply the term "disability" liberally, it seemed it was going to be difficult to impossible for employers to argue that a medical condition was not a covered disability. However, a few recent cases involving employees suffering from migraines may offer a ray of hope.

A federal district court in Connecticut recently rejected a claim by a postal worker that she was disabled as a result of stress-related headaches. The court said she had not proven that she was substantially restricted in her ability to work, and therefore could not successfully claim a violation of the ADA or the Rehabilitation Act.

At about the same time, a federal appeals court rejected a disability claim brought by a medical assistant whose migraine headaches caused her to "crash and burn" at the end of the day, so all she could do when she got home was go to bed. The judges pointed out she had not shown there were activities she could not perform, if not the same day then perhaps the next morning. Also, her claim was weakened by the fact that she experienced migraines only when working for one particular physician.

Our advice to employers is not to become paralyzed when someone invokes the "d" word. Not all physical or mental conditions

Recent S&G Website Alerts

Supervisors Can Be Personally Liable for Violations of FMLA,
Published February 13, 2012

NLRB Posting Requirement Set for April 30th Postponed Yet Again,
Published April 18, 2012

Labor Board Continues Push for Injunctive Relief,
Published April 27, 2012

qualify as disabilities. While the courts will interpret the definition broadly, and close cases probably are best treated as if the employee is protected, a condition is not a disability unless the employee can prove that it substantially interferes with a major life activity.

Free Speech Has Limits at Work

While certain types of speech seem to be acquiring greater protection in the workplace, such as employees complaining to each other about work-related issues, others seem to have less protection these days. Just a few days ago, the Connecticut Supreme Court overturned two multi-million dollar jury verdicts in favor of employees who claimed they were fired for speaking out on matters of public concern.

Both cases relied heavily on Garcetti v. Ceballos, a 2006 decision of the U.S. Supreme Court, in which an assistant prosecutor claimed he was retaliated against for siding with a defendant who argued that a search warrant was not supported by accurate information. The justices said the positions he took were in the course of performing his job, and therefore his employer had the right to be critical of him.

One of the Connecticut cases involved a Bridgeport school principal who alleged she was fired for reporting abuse of students by two teachers. A jury awarded her $2 million but our Supreme Court threw out the judgment. The Chief Justice said that since there was no dispute that the principal's statements were made in the course of the performance of her job, Garcetti precluded any recovery. She also said that the statute mandating reporting of child abuse did not create a private right of action in favor of employees who claim they were punished for doing so.

The other case stemmed from a long-running battle between a now-deceased medical lab scientist and his employer over test methods he considered to be improper. A jury awarded him damages totalling over $10 million. However, the justices ruled that the Garcetti logic applied to private sector employees in Connecticut and barred any recovery.

The scientist argued that he was entitled to the protection of Connecticut's free speech law, Section 31-51q. However, the justices said that the statute only applies if the employee's conduct does not interfere with his job performance or his relationship with his employer. In this case, the scientist stopped performing almost half of his job duties because of his concerns about the reliability of the test methods he was instructed to use.

Our opinion and that of employer groups generally is that these decisions are good news, because they help to show what has become a trend with employees and their lawyers. More and more terminated workers are claiming the real reason for their discharge was retaliation for engaging in some protected activity, and attempting to turn their firing into a battle over free speech.

Legal Briefs
and footnotes...

Bias Against Unemployed?
The Connecticut legislature is considering a bill that would prohibit employment discrimination against those who are out of work. The move stems from

concern, which has also been expressed in Washington, that some employers believe the unemployed are likely to be inferior workers. One might question this logic; it seems at least equally likely that those who have been out of work are more likely to appreciate having a job, and more likely to work hard to keep it.

Double-Dipping State Employees: A union representing hearing monitors working for Connecticut's Workers' Compensation Commission is challenging a ruling by the State Ethics Commission that they cannot charge private parties for transcripts of hearings produced during working hours for which they are paid by the state. In argument before the state's Supreme Court, the union pointed out that Judicial Branch reporters are permitted to do essentially the same thing, and that the current arrangement with hearing monitors is permitted by an agreement reached when the same issue was raised about 15 years ago. During oral argument, justices seemed unpersuaded, but a decision is likely some months away.

NLRB Seeks Interim Relief: The NLRB has gotten more aggressive about seeking court orders to restore the status quo while it is litigating unfair labor practice cases, and the courts seem receptive. Recently, a federal judge ordered the reinstatement of several service workers at the Stamford Plaza and Hotel after their jobs were outsourced under circumstances suggesting the hotel was motivated at least in part by the employees' efforts to unionize. Noting evidence that the discharge of pro-union workers had in fact frustrated union organizing activity at the facility, the judge ordered that the employee be rehired pending the outcome of the NLRB proceedings.

What Was He Thinking? An Avon police officer brought an employment discrimination claim against the Town, and then filed a grievance under his union contract when he was denied overtime pay to attend a CHRO hearing on his complaint. He relied on a contract provision guaranteeing a minimum of four hours pay at premium rates for those "required to appear at office hearings (i.e. Criminal/Civil Court, DMV, Liquor Commission)." A State Board of Mediation and Arbitration panel, not surprisingly, rejected that argument.

Sleeping on the Job: Apparently sleeping on the job is not always a discharge offense, despite what some employers may think. An arbitration panel reduced the one day suspension of a Torrington police officer, who slept in his cruiser while working "extra duty" at a construction site, to a written reprimand. Their decision was based in part on the department's code of conduct, which suggested that sleeping on the job was comparable to "conduct unbecoming an officer." On the other hand, a federal judge recently rejected a discrimination claim brought by Connecticut corrections officer fired after being videotaped in his office with the lights off, his feet on the desk and snoring. Though he later produced a medical report stating he had a condition associated with seizures and loss of consciousness, the judge reasoned that employers "cannot be expected to inquire into possible disabilities every time an employee exhibits poor performance." Do I hear an "Amen"?

Now We've Seen Everything: According to press reports, an Australian judge has ordered workers' compensation benefits to be paid to a woman injured by a falling light fixture during a romantic encounter with an acquaintance in a hotel room while on a business trip. He said she would have been compensated if she had been injured while playing cards, and the result should be no different when an injury occurs during sex. One wonders whether either conclusion would hold up in this country….

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