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Retaliation Claims Are Becoming More Common... And More Complicated!

Will retaliation claims replace discrimination complaints as the most common kind of employment litigation?

We have reported before on how an employer can defeat a discrimination claim, only to be brought down by an allegation that the employee has somehow been mistreated as a result of having complained of discrimination, albeit unsuccessfully. Now it seems plaintiffs' lawyers are bringing retaliation claims even when their client has not previously complained of discrimination. Lawsuits allege retaliation because of employee complaints to government authorities (whistle blowing), exercise of rights protected by state or federal constitutional or statutory provisions, ranging from free speech to FMLA leave to workers compensation, or even internal complaints about working conditions.

Perhaps this results at least in part from the fact that discrimination lawsuits are getting harder to win. Now that most people are members of some protected classification (age, race, sex, religion, disability, and almost a dozen other categories), judges want to see convincing evidence that the adverse action of which the employee complains was not based on performance or some other objective consideration.

But retaliation claims aren't a slam dunk either. For example, in two cases earlier this year, the Connecticut Supreme Court ruled that retaliation for the exercise of free speech rights is not actionable if the employee was speaking in his or her capacity as an employee rather than a citizen. The justices adopted the reasoning of the U.S. Supreme Court in its 2006 *Garcetti vs. Carballos* decision, which addressed the issue of free speech under the U.S. Constitution. To confuse matters, however, a federal District Court recently ruled that *Garcetti* may not apply to free speech protected by the Connecticut Constitution, because it contains language that is broader than the First Amendment to the U.S. Constitution.

Also, *Garcetti* applies only to public sector employees, since the First Amendment only addresses government action. On the other

hand, Connecticut's free speech law, Section 31-51q, has been interpreted as applying to private as well as public employers. None of these issues are firmly and permanently settled, so employers are left to guess about what speech or conduct will or will not be protected going forward.

Our advice to employers has always been to assess what claims an employee could make if he or she decides to challenge some adverse employment action. In addition to considering the employee's membership in a protected class, employers should examine whether he or she has recently brought a claim, made a complaint, or otherwise engaged in speech or conduct protected by state or federal statutory or constitutional principles.

Many Bonuses are Not "Wages"

In some fields, people think of annual bonuses as part of their compensation, especially if they are based at least in part on employee performance. Maybe so, but if either the payment of any bonus or the amount of the bonus is discretionary, it doesn't constitute "wages" under Connecticut law. What difference does that make? Well, for one thing, the Labor Commissioner has no jurisdiction over it, as the Labor Department recently learned the hard way.

A Chubb Insurance employee filed a wage claim with CT DOL when he was not paid a $37,000 bonus he was expecting based upon his performance. Although Chubb's plan specified how bonuses would be computed, it also clearly stated that the company's board of directors could reduce or eliminate any bonus award under the plan, so Chubb moved to dismiss a lawsuit brought by the Commissioner on the employee's behalf. It argued that DOL's statutory authority to recover unpaid wages didn't apply to discretionary bonuses.

A federal judge agreed, citing recent decisions of the Connecticut Supreme Court that draw a clear distinction between discretionary and non-discretionary bonuses. In order to qualify as "wages," a bonus must be entirely non-discretionary, both as to whether the bonus will be paid and as to the amount. He also dismissed the Commissioner's common law claims, pointing out that the Commissioner's authority in this regard is also limited to cases where the amount at issue constitutes "wages."

A similar outcome resulted from a lawsuit brought by a Greenwich Capital employee who claimed he was owed an annual bonus of almost $200,000. Greenwich Capital was owned by the Royal Bank of Scotland, which almost went bankrupt in 2008. As a result, it said future bonuses would vest over three years, and that employees who left during that period would forfeit any bonus. The plaintiff resigned in 2009, but still claimed entitlement to a bonus. A Superior Court judge ruled against him, on the same reasoning used in the Chubb case.

Bonuses are to be distinguished from commissions, which generally are based entirely on employee performance, and are not discretionary. In fact, terms of a sales commission plan that result in forfeiture of payments may not be enforceable. An employee of a security service sued for double damages after he was fired and his employer refused to pay commissions he had already earned, citing a forfeiture provision in its plan. A Superior Court judge ruled that provision was contrary to the public policy favoring the payment of wages, and therefore was unenforceable.

Our advice to employers is to have bonus or commission plans reduced to writing, and to be clear about both the basis on which the amounts are calculated, and whether and when they will be paid. Also, if a dispute arises about payment, the first thing to look at is whether the amount at issue constitutes statutory wages, since the answer has an impact on what remedies may be available.

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CHRO Remedies Hotly Disputed

There has been a long-running dispute over whether Connecticut's Commission on Human Rights and Opportunities has the power to award complainants anything more than lost wages and benefits in the event they are found to be victims of discrimination. At issue in particular are monetary awards for emotional distress, pain and suffering, attorneys fees, punitive damages, etc.

In general, such awards have been modest, a few thousand dollars at most, and therefore not worth litigating, in the opinion of most employers. The City of Shelton apparently is an exception. Facing two discrimination complaints filed by city employees, Shelton took the unusual step of asking a federal court to issue an injunction to block the CHRO from imposing compensatory or punitive damages upon it or any other employer. Its argument is based in large part on two Connecticut Supreme Court decisions from the 1990s in which the justices ruled that the CHRO has no power to award compensatory damages under this state's primary anti-discrimination statute.

The CHRO, however, argues that it is also enforcing rights protected under federal law, which does allow for compensatory and punitive damages. Shelton's lawyers countered that argument by pointing out that under federal law those remedies can only be imposed by judges and juries, and assert that allowing CHRO hearing examiners to award such remedies would actually deprive employers of due process.

Meanwhile, the issue of punitive damage awards in CHRO cases has been addressed in a pair of recent Superior Court cases, one involving a public employer and the other a private sector employer. Both judges ruled that punitive damages were not recoverable. However, other judges have reached the opposite conclusion in earlier cases, and the Supreme Court has not addressed this issue.

Our opinion is that the scope of the CHRO's remedial powers should be determined once and for all, and soon. This is too important a question to be left open to debate.

CT FMLA Counts Only CT Employees

While the federal Family and Medical Leave Act covers employers with 50 or more employees, Connecticut's version of the law only applies to companies with 75 or more workers. But does that mean 75 employees in Connecticut, or a total of 75 employees with at least one of them in Connecticut?

Our Supreme Court answered that question a few weeks ago: there must be at least 75 employees in Connecticut. The case involved an employee who broke her hand on the job, and was given her federal 12-week allotment of FMLA leave. However, she needed more time to recover, and the employer had no light duty available, so she was terminated. She complained that she should have been afforded 16 weeks of leave under CT FMLA.

The company successfully argued that it would make no sense to apply the law, for example, to an employer with its main location in Alaska, and only a handful of employees in other states, including Connecticut. The court also noted that the employee's interpretation of the law would require the CT DOL to attempt to investigate the employment

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records of out-of-state companies over which it has no jurisdiction.

Our opinion is that this decision was a no-brainer. However, given the legal landscape these days, employers can't take anything for granted.

Legal Briefs
and footnotes...

UC Appeals Often Successful:
As we have observed before, in this tight economy the employment security folks at the DOL are looking more carefully at claims for jobless benefits filed by people whose own misconduct gets them fired. Sometimes, however, employers have to go beyond the initial level to get the right result. In two recent cases, appeals referees reversed administrator decisions awarding benefits, and those reversals stood up in court. One involved a worker who repeatedly failed to properly punch in and punch out, and the other an employee who was on the internet for up to two hours each day. Apparently employers do have a right to require employees to correctly record their time, and to refrain from personal business during hours for which they are paid.

Public Policy Claims Limited:
An employee who claimed he was terminated in violation of public policy because he had complained to management about threats of violence by a co-worker based his argument on an early 1900s statute that is still on the books. It talks in terms of "master and servant," and requires employers to provide "a reasonably safe place in which to work," as well as "fit and competent co-laborers." A Superior Court judge said the proper remedy for a violation of that statute is an enforcement action by the Labor Commissioner. He also said the state's whistle blower statute didn't apply, because the employee's complaint involved an internal issue and not a matter of public concern.

"Portal-to-Portal" WC Claim Fails:
A Danbury police officer was injured when he fell on ice as he walked from his home to his car to drive to work. Based on a special law that only applies to police officers and firefighters, and provides workers comp coverage when traveling to and from work, he filed for benefits. The trial commissioner awarded them, but the Review Board reversed that decision and denied benefits. Although the law is often loosely described as allowing portal-to-portal benefits, the actual wording says "abode," which means home. Therefore, the statute didn't apply until the officer left his property and commenced his commute to work.

"Perceived Disability" Not Protected?
Under federal law, employees are protected from discrimination not only if they actually have a physical disability, but also if they are perceived as having such a disability. An example might be a disfiguring scar that doesn't interfere with any major life activities. A recent court decision holds that Connecticut's Fair Employment Practices Act only addresses actual disabilities, not perceived disabilities. However, a few other state and federal court decisions have gone the other way, and the Supreme Court hasn't weighed in on the issue, so it may not be settled yet.

Correction: In our last issue we reported on the Hartford office of the NLRB becoming a "sub-region" of the Boston office. We said that as a result, the Regional Director of the Boston office, Rosemary Pye, would have jurisdiction over the Hartford office. In fact, Ms. Pye has now retired, so Jonathan Kreisberg of the Hartford office will take over her job, and John Cotter will be the "officer in charge" of the Hartford office.

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