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COUNSELORS AT LAW

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in this issue

Labor & Employment Law Department

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Rowland Layoffs Overturned by Federal Appeals Court

Back in 2002, then-governor Rowland attempted to negotiate concessions from the State Employees Bargaining Coalition (SEBAC), but couldn't get the cuts he was looking for. As a result, he ordered the layoff of approximately 2800 state employees, which became effective in 2003. All the position eliminations were in collective bargaining units represented by SEBAC unions; non-union positions were not touched.

Although the stated reason for the layoffs was to achieve the savings necessary to balance the state's budget, the reductions apparently had minimal effect because of the notice requirements in some of the applicable contracts, the impact of unemployment compensation costs, and the fact that some of the jobs were not funded with state money. SEBAC sued and sought injunctive and monetary relief, claiming that targeting unionized employees for layoff was unconstitutional, because it violated the employees' constitutional right to freedom of association.

The case went through several procedural steps, and it wasn't until a few weeks ago that the federal appeals court with jurisdiction over Connecticut finally addressed the basic issue of whether unionized employees could be "targeted" for termination under the circumstances present in 2002-03. It concluded that the terminations violated the constitutional rights of the affected employees.

Central to the court's decision was its view that membership in a union is comparable to membership in a political party, and that employment decisions based on either factor are subject to the same strict scrutiny. The judges said the state had to have a "compelling interest" at stake in order to justify discriminating against unionized employees. They noted that the parties had stipulated that the financial impact of the RIF was minimal, and bore no relationship to the dollar amount of the concessions the administration had sought but failed to obtain.

The court's opinion also points out that the same or greater savings could have been achieved by terminating employees in both union and non-union groups, which would not have penalized unionized employees in particular. However, since a large majority of state employees are unionized, the impact of any statewide RIF would have fallen largely on them.

The appeals court sent the case back to the trial court with instructions to "craft appropriate equitable relief." What that means is anyone's guess, since those affected were returned to work long ago, and monetary relief apparently is not available. Meanwhile, press reports indicate the state is considering an appeal.

Our opinion is that the appellate court may have overlooked a significant point. Not all state employees in bargaining unit positions have chosen to become dues-paying union members. Some are non-members who simply pay a representation fee. Presumably when layoffs were ordered, the applicable union contracts dictated that the RIF be conducted by inverse seniority, which would impact union members and non-members alike. If so, the layoffs were based not on union membership per se, but rather on the status of being represented by a union, which status any given employee may or may not have wanted or chosen. It's not clear that state actions based on that status should be subject to the same strict scrutiny standard the court applied in this case.

Recent S&G Website Publications

Two Supreme Court Rulings Will Make Liability Issues Simpler for Employers
Published July 2, 2013

New Changes for New Hires: The New I-9 Form
Published May 6, 2013

Favorable Rulings for Employers in EEOC Litigation
Published May 28, 2013

When is Employee Speech Constitutionally Protected?
Published May 28, 2013

Employee Surveillance Has Its Limits

As was dramatically demonstrated during the investigation of the Boston Marathon bombing, surveillance cameras are an integral part of our daily lives. In the employment context, however, surveillance has its limits.

Some years ago, Connecticut adopted a requirement that employers notify their employees of the various types of electronic surveillance to which they are subject. This can mean anything from video cameras in the parking lot to electronic access systems to email monitoring. We have previously reported on litigation over the application of that statute to GPS monitoring in an employer's vehicles. A recent case involving a group of public employees indicates just how sensitive decision-makers are about these matters.

In 2011, city employees in Stamford staged a rally in opposition to a reduction in retirement benefits for new hires. When a city attorney in the HR department left work that day, he saw the rally and took a single photo of it on his cellphone, which he forwarded to the HR director's cellphone so he would be aware of what was going on. The president of one of the local unions saw the attorney take the photo, and filed charges with the State Labor Board alleging that the city was interfering with "concerted protected activity."

Although the HR director didn't even see the photo until a day or two later, and no action was taken against any of the participants in the rally, the Labor Board found a violation. Relying on the reasoning of NLRB cases with similar fact patterns, the Labor Board said the City would have been justified in photographing the demonstration if necessary to document actual or reasonably anticipated employee misconduct, but that was not the case here. While the attorney was not acting at the direction of the City, there was no effort to disavow his conduct, or to reprimand him for it.

The Board also rejected claims by the City that any violation was *de minimis*, and that there was no evidence any employee had felt intimidated or coerced. The Board said the conduct *per se* was illegal, regardless of whether it had any adverse consequences.

Our advice to employers is to be particularly sensitive to employee privacy issues in today's workplace, given all the focus on governmental and commercial intrusion in almost every aspect of our lives. While there are many good reasons to monitor employee conduct, it is important to be careful about when and how it is done, and to assure that there is no surveillance that could be perceived as covert, unless that is justified in the course of investigating specific misconduct.

Governor Vetoes Non-Compete Bill

As if more generous FMLA than the rest of the country, a first-of-its-kind paid sick leave law, and even raising the minimum wage wasn't enough to solidify Connecticut's reputation as anti-business, our General Assembly passed at the end of its session a bill that undermined and could invalidate many non-compete agreements that employers use to protect their companies from unfair competition by former employees.

The bill provided that in the event of a merger or acquisition, a non-compete agreement with an employee affected by the transaction that is "entered into, renewed or extended after October 1, 2013" would only be valid if the employee was given at least seven days to consider "the merits of entering into the agreement." Recognizing that the bill was full of ambiguities, and would likely lead to costly and time-consuming litigation, the governor vetoed it just a few days ago.

The bill was unclear as to whether it applied only in the case of a full-fledged acquisition, or applied as well to a transfer of less than a 100% interest in an employing entity. It also didn't address how it affects employees of an out-of-state employer; whether it applies to an entity that isn't "engaged in business" (such as a non-profit organization); and whether it has any impact on restrictive covenants other than non-compete agreements, such as non-solicitation or non-disclosure requirements.

The proposed legislation did provide for the waiver of the seven-day waiting period if an employee did so in a "separate writing," but it didn't explain what a separate writing was, whether an employer could require an employee to execute such a waiver as a condition of continued employment, or whether such a waiver could be signed in advance of renewing or extending a non-compete agreement, thereby effectively nullifying the impact of the bill.

Ambiguities aside, there is a more basic reason why the legislation was ill-advised. When an employer merges with or is acquired by another entity, the bill suggested that any employee with a non-compete agreement must be given a choice of whether or not to be bound by the same terms under the new owner. What company would want to acquire an entity with no assurance that its key employees won't walk away from their non-compete obligations?

Our opinion is that the Governor did the right thing. Challenges to this bill and disputes over its interpretation and application would certainly have kept lawyers and judges busy for years to come.

Now We've Seen Everything. . .

Once in a while we pass on tidbits that we've run across in the publications we monitor that leave us shaking our heads. We've seen three such stories in just the last couple of weeks. Since we've had difficulty choosing among them, we decided to pass on all three:

A postal worker in North Carolina filed a workers' compensation claim, alleging that as a result of an on-the-job injury she was unable to "stand, sit, kneel, squat, climb, bend, reach, grasp or lift mail trays." However, while out of work collecting benefits, she appeared on the TV game show "The Price is Right" and was able to spin the well-known "big wheel" at least twice. Further investigation showed that she had been zip-lining on a Carnival Cruise vacation, and was seen carrying heavy furniture on more than one occasion. She recently pleaded

guilty to fraud and will be sentenced in September.

A spa worker has filed suit in Pennsylvania after being fired for refusing to undergo a "Brazilian wax" because she thought it would be painful and embarrassing. Female employees but not males were required to perform this procedure on each other as part of new hire training for the position of wax specialist, which pays $8.00 per hour. She alleges wrongful termination, retaliation, sex discrimination and sexual harassment…

The Iowa Supreme Court recently reaffirmed a decision they made several months ago rejecting a claim of sex discrimination by a woman who was fired because her boss found her "irresistible," and was starting to have feelings for her that were interfering with his marriage. Like the court's original decision, this one was unanimous. The judges said the discharge was based on the employer's feelings, not on the employee's gender. Her lawyer argued unsuccessfully that the employer wouldn't have had those feelings if the employee were not female.

Our opinion is that the Iowa Supreme Court's decision to reconsider the case might have had something to do with the fact that the judges have to stand for election every few years, and more than half the registered voters in Iowa are women. If so, that apparently that was not enough to make them change their minds.

Legal Briefs
and footnotes

Healthbridge Back in Court: Several months ago we reported that after the NLRB obtained a federal court injunction prohibiting Healthbridge nursing homes from reducing union wages and benefits because they had not established that there was a bona fide impasse in negotiations, the company convinced a bankruptcy judge to approve the same reductions because the solvency of the enterprise was in jeopardy. The NLRB went back to the federal judge arguing that Healthbridge was flaunting his order, and demanding that the original injunction be enforced. Recently the two sides filed briefs with the judge, and it will be interesting to see which court's order takes precedence.

Computers Don't Discriminate: A retail employee in an Autozone store was terminated after an automated computer program identified her as possibly involved in suspicious activity relating to customer reward cards. She admitted to violating policy, but brought suit because she claimed the real reason for her discharge was her store manager's prejudice against her on various grounds, including the fact that she was a Rastafarian who wore dreadlocks. However, a Connecticut Appellate Court panel found that the store manager wasn't even involved in the investigation. It said being selected by a computer program "was not a circumstance giving rise to an inference of discrimination."

Another Pension Revocation: In our last issue we reported on actions by the Attorney General to reduce or eliminate municipal pension benefits payable to former employees who have misappropriated funds from their employer. Recently the Attorney General went after the pension of a retired employee of the city of Stamford who had pled guilty to larceny, even though he had worked for the city for over 35 years, and had paid $133,000 in restitution. A Superior Court judge granted the state's motion for summary judgment.

Save the Date

S&G's Labor & Employment Fall Seminar for private sector employers will be held on Friday, October 25, 2013 at the Hartford Marriott.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539