SHIPMAN & GOODWIN LLP
COUNSELORS AT LAW

Employment Law Letter

WINTER 2014

in this issue

Labor & Employment Law Department

www.shipmangoodwin.com

New Marijuana Laws Raise Drug Testing Questions

Many states, including Connecticut, have become more tolerant of marijuana use, at least for medical reasons, and a few have actually legalized recreational use, notwithstanding federal law to the contrary. The question is, what does all this mean for employers who don't want employees who use drugs in their workforce?

So far, it seems the courts (at least those in other states) are saying that employers have the same rights they've always had to discipline or discharge employees who test positive for pot, even if the employee has a prescription authorizing his or her marijuana use for medical reasons. Just as alcohol use is legal but you can't be under the influence on the road or on the job, the same seems to be true of medical marijuana. The difference of course is that alcohol stays in your system for a matter of hours, while pot stays for days or even longer. So how does an employer know whether an employee is actually "under the influence" when he or she fails a drug test?

The safest approach is not to require a test in the first place unless the employee is displaying the classic symptoms of intoxication: glassy eyes, slurred speech, physical instability, erratic behavior and the like. Under Connecticut law, indicators such as this are required in any event for an employer to engage in "reasonable suspicion" urinalysis drug testing, unless the employee's job has been designated by CT DOL as "high risk or safety sensitive." In those jobs, as with CDL truck drivers, random testing without reasonable suspicion is permitted. While we are still somewhat up in the air as to what reasonable suspicion is, we do have some guidance on what it isn't.

When the Connecticut law on drug testing was passed, the Department of Labor was supposed to adopt regulations that would (among other things) define reasonable suspicion. However, when they issued draft regulations with unreasonably strict requirements, such as aberrant behavior of the employee observed by at least two supervisors trained in detection of drug use, there was such an outcry that the regulations were withdrawn. Therefore, we have to rely on a common sense definition of reasonable suspicion, namely the tell-tale signs listed above.

We also know that employee involvement in a workplace accident, without more,

does not provide the basis for a reasonable suspicion of drug use, because an employer policy requiring testing in such circumstances was struck down by a Connecticut court. Recently, another employee drug test was nullified by the courts, because the employer waited several hours after observing signs of drug use before taking the employee off the job. The judge concluded the employer must not have thought the employee was impaired by drugs, or it would have acted sooner.

Our advice to employers is to proceed cautiously if an employee or job applicant who tests positive for marijuana can prove that he or she is a "qualifying patient" under the new Connecticut statute addressing palliative use of marijuana. That law prohibits discrimination against employees or prospective employees because of their status as a qualifying patient. While there are as yet no reported cases on it, the law seems to suggest that a positive drug test, without proof of intoxication or impairment while at work, cannot be used to disqualify from employment someone who has a valide prescription for medical marijuana.

Off-Duty Conduct Can Justify Firing

We have examined before the circumstances in which an employer can discipline or discharge an employee for his or her actions away from work, but some recent decisions provide further guidance.

One involved a Bridgeport firefighter who returned home from work during a snowstorm and found that his house had been burglarized. However, while his actual losses were about $2000, he reported more than ten times that much to his insurance company. For example, he claimed his motorcycle had been stolen, when in fact he had disassembled it and hidden the pieces behind a wall he constructed in his basement.

When the City fired him, his union took the matter to arbitration. The majority of the arbitration panel found the employee's offense was sufficiently related to his job to justify the City's action. The crime was reported in the press, which reflected badly on the fire department. Also, firefighters often enter homes and businesses when the occupants are not there, and they must be trustworthy. Arbitrator Raymond Shea, a former firefighter and longtime fire union president, predictably dissented.

Issues of job-relatedness can arise in other contexts too. For example, a terminated employee can be denied unemployment compensation if his or her offense involved misconduct "in the course of employment." A Superior Court judge recently held that phrase is not limited to conduct that occurs while the employee is working, and denied unemployment benefits to a worker fired for misconduct during a grievance meeting.

Our opinion is that when an employee engages in some sort of significant misconduct, unless the offense has absolutely nothing to do with the job – a domestic dispute that gets out of hand, for example – an employer may at least consider whether the matter has an impact on the employee's suitability for continued employment. These days, there are lots of highly qualified job applicants who may be a better fit in the long run.

Beware of Workers Comp In Separation Agreements

Normally we avoid stories that are likely to be of more interest to lawyers than employers, but this one contains important lessons for both.

A Connecticut company negotiated a separation agreement with a long-term employee that paid him over six months severance and required him to release all claims, including a pending workers comp case. However, after the deal was signed, the Workers Compensation Commission

Recent S&G Website Publications

Q&A: Year-End Thoughts on EEOC Enforcement, Social Media Trends
Published December 23, 2013

Developing Labor Law: The Requirement of Employee Neutrality
Published 2013 by ABA Section of Labor and Employment Law

refused to approve it as a "voluntary agreement" under Connecticut law, and our Supreme Court upheld that ruling.
The company then sued its former employee and demanded return of the more than $70,000 he got in severance as part of the deal, based on the employee's admission in the course of litigation that he never intended to release the comp claim. The employee responded with a claim of workers compensation retaliation under Section 31-290a, alleging the employer's suit was filed in retaliation against him for exercising his rights under the workers comp laws. The company tried to get that claim dismissed under the doctrine of "litigation privilege," which protects litigants from liability based on what they say or do in the course of a lawsuit.

The squabble ended up once again at the Supreme Court. The justices ruled that litigation privilege or litigation immunity protects the parties to litigation against claims such as defamation based on what they say during a lawsuit, but does not provide protection against claims of misuse of the judicial process, as in vexatious or retaliatory litigation. They refused to dismiss the employee's 31-290a claim.

It's not clear how all this will turn out in the end, but things do not look good for the employer. The important lesson, however, is that all this litigation was avoidable if the employer had made the separation agreement contingent on the comp commissioner's approval of the deal.

Our advice to employers who are settling with a departing employee is to give special consideration to workers compensation claims. Unknown or future comp claims are not waivable in Connecticut. Workers comp retaliation (Section 31-290a) claims are waivable, but only based on facts known when the release is signed, so the waiver signed by the employee in the litigation discussed above could not protect the employer from the claim he made based on the lawsuit it later filed against him. In short, having made the mistake of signing an agreement that was not conditioned on getting the comp commissioner's approval, the employer probably should have taken its lumps and walked away.

Legal Briefs *and Footnotes*

"Personnel File" Ends at Death: Connecticut's Freedom of Information Act exempts from disclosure personnel and medical files when an employee reasonably believes such disclosure would violate his or her privacy. When the City of Danbury tried to assert such a claim on behalf of a deceased employee, however, a Superior Court judge ruled only the employee could object to disclosure, effectively eliminating the FOIA exemption for employees who have passed away.

Staffing Agency Not Liable: When a staffing agency "loans" a worker to a customer on a long term basis, exactly whose employee is he or she? That question arose in the context of a lawsuit by a third party injured in an accident allegedly caused by the negligence of a loaned employee. The court rejected an attempt by the plaintiff to include the staffing agency as a defendant, ruling that when all the agency did was to collect a fee from its customer and process the worker's payroll, it wasn't an "employer" for purposes of imposing liability for the employee's negligence.

Lawsuit Over 2003 Layoffs Ends: Last year we reported on a federal appellate court win by a

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

coalition of unions challenging layoffs by the Rowland administration in retaliation for their refusal to agree to concessions. The Attorney General initially asked the Supreme Court to review that decision, but the appeal was withdrawn and the Malloy administration announced plans to negotiate a settlement. Although former Governor Rowland and former OPM Secretary Ryan (who were named as individual defendants) also sought Supreme Court review, that request was recently rejected.

Volunteers Can't Claim Job Bias: A Superior Court judge has affirmed a CHRO decision rejecting a claim of race discrimination by a volunteer working for an ambulance company. Although the volunteer work resulted in training, education and experience, that was not sufficient "compensation" to make the volunteer an "employee" under Connecticut's Fair Employment Practices Act. Therefore, even if she was subjected to verbal harassment and voted out of the ambulance crew because she was African-American, CHRO could not grant her relief.

Nursing Home Litigation Drags On: The epic battle between HealthBridge Management and healthcare union District 1199 over wages and benefits at five Connecticut nursing homes continues to escalate. First the company declared an impasse in negotiations, and cut back on various wages and benefits. The union responded by striking, but the company hired replacements and refused to let the strikers return to work. Then the NLRB found that no legitimate impasse had been reached, and said the strike was caused by the employer's unfair labor practices. It ordered restoration of the status quo ante and reinstatement of the strikers with back pay since their offer to return to work. The nursing homes complied, but immediately went to bankruptcy court and obtained relief from various wage and benefit provisions which they claimed would force them to close. Now a federal court judge has found HealthBridge in contempt of court for not complying with the NLRB's order. The company has filed an appeal, and the judge's order has been temporarily stayed. The situation is complicated by the fact that the NLRB proceedings are against HealthBridge Management, which is under contract to run the nursing homes, while the owners of the homes were the parties in the bankruptcy proceedings. Stay tuned for further developments.

Now We've Seen Everything: What do you get if you are named a Wal-Mart Employee of the Month? No money, no merchandise, just honorary recognition and a designated parking place for the month. However, even that was too much for a Wal-Mart employee in Deerfield Beach, Florida, who apparently thought he deserved the honor. When a co-worker won the award, he pulled into a parking space next to hers, and fired a gun into her unoccupied car. A Wal-Mart spokesperson says he no longer works there.

Save the Dates:

S&G's Labor & Employment Spring Seminar for public sector employers will be held on **Thursday, March 13, 2014** at the Sheraton Hartford South Hotel. To register, go to the events tab on our website and click on the March 13th date.

Sexual Harassment Prevention Training
Sexual Harassment Prevention Training seminars will be held on the following dates, and in the following locations:

February 27th - Hartford office
April 3rd - Hartford office
April 10th - Hartford office
April 24th - Stamford office
May 1st - Hartford office

Registration fee is $50 per person, and each attendee will be provided with a certificate upon completion.