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Employment Law Letter

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Labor & Employment Practice Group

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What Does It Take To Fire a Cop?

There was a lot of publicity and significant public outcry when Windsor Locks police officer Robert Koistinen recently was ordered reinstated by an arbitration panel, despite being terminated by the town for giving his son (a fellow officer who as it turns out had been drinking) special treatment after the younger Koistinen struck and killed a young bicyclist. Although the police department had set itself up for this problem by not having an anti-nepotism rule, people were left to wonder how you can trust the police to protect the public when they seem more interested in protecting each other.

However, the Windsor Locks case was just one of many where the discharge of a police officer has been reversed by arbitration panels at the State Board of Mediation and Arbitration, which has a reputation in some quarters for favoring public employees and their unions. And it's not just arbitrators; in some cases the courts seem soft on police misconduct as well.

Take the case of a Stratford police officer who crashed his patrol car into two other vehicles when he had an epileptic seizure while on duty. Though his personal physician returned him to duty, the town sent him to a neurologist. It was later discovered that he lied to the neurologist about his seizures and about a history of alcohol use. After he was fired for his misrepresentations, a panel of arbitrators overturned the discharge. They said while his lying was serious, it was understandable because he was only trying to save his job.

The town went to court, and argued that saving one's job is not an excuse for a police officer to lie about an important issue, but a Superior Court judge upheld the award. Fortunately, the town pursued the matter to the Appellate Court, which reversed the decision, stating that "it is against public policy for a police officer to lie." Obviously, a record of dishonesty would have an impact on the weight of a police officer's testimony in court proceedings involving criminal defendants. However, the police union has appealed the matter to the Connecticut Supreme Court, which heard arguments in the case on March 25, and will likely decide it by June.

Even when arbitrators find that an officer's conduct is reprehensible, they seem reluctant to sustain a dismissal. For example, a Westbrook constable was fired after failing to respond to a report of a woman standing in a field in a thunderstorm and perhaps in need of medical attention. The next day, a body was found in Long Island Sound, which was later identified as the woman in the

field. The union representing the constable contested the discharge. Arbitrators from the SBMA concluded that while she had clearly neglected her duty, and stiff punishment was warranted, termination was too severe. They ordered her reinstated, albeit without back pay.

The problem with these decisions is that in each case a panel of arbitrators or a court is deciding whether a police officer is fit to carry out a critical security role in the community, rather than those elected or appointed by members of the community to make such determinations. However, public officials can't always agree on such matters themselves. When a New London cop was fired by that city's mayor for excessive use of force (shooting an unarmed thief four times), a panel of arbitrators reversed his termination, finding no evidence that his use of force was "not objectively reasonable or that it was excessive." The city council, on a 4-3 vote, decided not to appeal that decision.

Our opinion is that being a public employee is a privilege, not a right. Arbitrators and judges should be very reluctant to second-guess the judgment of those who oversee employees who provide public services, especially employees with life-and-death roles, such as police officers. No doubt being a cop isn't easy, and 99% of them may be a credit to their uniform. However, in any job there are some who shouldn't be there, and it shouldn't be so difficult to get rid of the bad apples as it seems to be in Connecticut.

Employment Lawsuits: Lost Wages are Just the Beginning!

Lawyers sometimes get criticized for being too quick to settle employment cases. Clients resent having to pay good money to settle a claim they feel is bogus. What they don't often consider is that if the employee wins, he or she may collect much more than the amount that can be proven in economic losses.

Highland Park Market recently learned that lesson when they replaced an IT employee with a contracted service only days after he returned from FMLA leave and filed a workers compensation claim. Given the timing, a jury didn't believe the employer's claim that the plaintiff's termination was part of a previously planned reduction in force. They awarded him $103,000 in economic damages. However, the judge tacked on an equal amount in liquidated damages for a willful FMLA violation.

In January of this year, IBM was hit with a verdict by a Connecticut jury in an age discrimination case that cost them almost $1 million in lost wages, an equal amount in liquidated damages, and $500,000 for emotional distress. Before they terminated a 40-year employee who had risen through the ranks to vice-president, his new (and significantly younger) supervisor repeatedly suggested that he consider retirement.

Another potential problem for employers is the matter of attorneys' fees in cases where a prevailing plaintiff may be entitled to them. For example, an employee who sues for workers compensation retaliation under Connecticut's Section 31-290a may collect attorneys' fees if he wins, and a court recently awarded a successful plaintiff over $78,000 for attorneys' fees (more than he got in lost wages), even though a jury did not give him emotional distress or punitive damages.

Our opinion is that awards here in Connecticut pale in comparison to those in some other employee-friendly states. A California jury recently ordered Staples to pay a former employee over $26 million (mostly in punitive damages) after finding that his age played a role in his discharge. The evidence showed he had been the butt of jokes at staff meetings, and was referred to as "old goat" and "old coot." There was also testimony that management wanted to get rid of older employees because they tended to be more highly compensated. In retrospect, a reasonable settlement before trial would have been a wise move.

Recent S&G Website Publications

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Published March 6, 2014

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"Loose Lips Sink Ships"

That old saying from World War II days was meant to convey a warning not to discuss matters in public that might have national security implications, because you never could tell who might be listening. The same principle applies today in the context of employment litigation.

A good example can be found in a recent court case in which a terminated employee was claiming his discharge was in retaliation for having reported a safety issue with the truck he was driving. He alleged a violation of Connecticut's free speech law, Section 31-51q, because he was raising a matter of public concern, namely highway safety.

However, his employer pointed out that he apparently had no problem driving the truck back to North Haven, where he had started the day's work, after discovering the problem in Orange. He only refused to operate the truck after 7:00 p.m., when he was instructed to drive it to Norwich. What really sank his ship, however, was the testimony of a mechanic who had worked on his truck in Orange earlier that day, when the problem was first noted. The mechanic said the employee told him, "I don't feel like working late."

It's not the first time a casual remark has gotten a party to an employment dispute in trouble. Many race, sex or race discrimination cases include evidence of workplace statements that are indicative of some degree of bias. In close cases, such evidence can tip the scales in favor of one party or the other. However, not all casual remarks are fatal.

A federal court recently dismissed a claim by a 32-year employee of Yale that he had been let go because of his age. Although Yale introduced evidence of various performance deficiencies, the plaintiff cited a conversation with a Yale dean some five months earlier in which she had asked him about a rumor that he was considering retirement. Her explanation was that she needed to develop a succession plan if he was in fact retiring.

The judge cited a U.S. Supreme Court decision from the 1990s that said, "Stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination." In this case, the key factors contributing to the outcome were that the plaintiff had no other evidence of discriminatory intent, and Yale had solid evidence of performance problems. The fact that several months had elapsed between the retirement discussion and the termination was also helpful to the employer.

Legal Briefs *and Footnotes*

CT Minimum Wage Rises to $10.10: Although the District of Columbia and some other cities and counties have recently acted to raise wages for their employees, those working for their contractors, and in some cases other employers within their jurisdiction, Connecticut has become the first state to raise its minimum wage to $10.10, as urged by President Obama. Currently at $8.70, the minimum will rise to $9.15 in 2015, $9.60 in 2016, and $10.10 in 2017. It will be interesting to see whose predictions about the impact of such a change turn out to be true.

Facebook Post Tanks Settlement: The headmaster of a Florida private school settled an age discrimination complaint

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against his employer for $80,000, with a confidentiality provision guaranteeing that he would not disclose the existence or the terms of the settlement. Unfortunately, he told his daughter about it, and she went on Facebook to boast that her dad "won the case" against the school, which was "now officially paying for my vacation to Europe this summer. SUCK IT." Not surprisingly, the school demanded its money back. Although a lower court ruled the post didn't violate the confidentiality provision, an appeals court disagreed, noting that the daughter did "precisely what the confidentiality agreement was designed to prevent." The father was required to pay back the $80,000.

Weingarten Applied to Drug Test: In our last issue we discussed workplace drug testing in an era of legalized marijuana. A recent decision of the State Board of Labor Relations suggests a footnote to that story. In response to reports of drug use by some Bridgeport police officers, the chief ordered all officers to be tested, and their union filed a complaint with the SBLR. Although the Board ruled the chief's action was not inconsistent with the department's random drug testing policy, it said that the denial of requests by some officers for union representation when the tests were administered violated the officers' Weingarten rights, because a drug test is in effect an "investigatory interview." While that logic is questionable, cautious employers should probably grant similar requests in the future.

Volunteer Can't Go to CHRO: An African American volunteer for an ambulance company claimed she had been discriminated against as a result of racially insensitive comments and ultimately being voted out of the ambulance crew, allegedly because of performance issues. A hearing referee at Connecticut's Commission on Human Rights and Opportunities ruled that the complainant could not present her case to the CHRO, because she was not an employee. He said training, education and experience was not enough to constitute "consideration" sufficient to turn a volunteer into an employee entitled to protection under the Fair Employment Practices Act. A similar decision a few years ago suggests that even the provision of health insurance may not be enough to convert a volunteer to "employee" status.

Twins Aren't a Disability: An employee of EastConn Regional Education Service Center became pregnant with twins. Several months later, her doctor said she could not restrain students or work one-on-one with aggressive students. Since these were essential functions of her position, EastConn put her on FMLA, and she used up her allotment before the health of her twins permitted her to return to work. When she was terminated, she claimed an ADA violation. However, a federal court judge cited case law to the effect that pregnancy was not a disability, and ruled that her pregnancy was not so complicated as to justify a different result. Further, her limitations did constitute an impairment of any "major life activity." The judge also noted the fact that five months elapsed between when EastConn was notified of the pregnancy and when it terminated the employee strongly indicated there was no pregnancy bias involved.

Save the Date:

May 22nd - 1:00 PM - 2:00 PM

Webinar: Effective Tools or Unenforceable Traps?
How and When to Use Employment Contracts and Non-Competes

This complimentary webinar is hosted by Gabe Jiran and Glenn Cunningham. For more information or to register, visit: www.shipmangoodwin.com/events/etc.