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No Punitive Damages Allowed Under CT Discrimination Law

For many years there has been disagreement about whether or not employees who bring discrimination claims under Connecticut's Fair Employment Practices Act can get punitive damages (not just compensatory damages for lost wages etc.) if they prevail. Not surprisingly, employer groups have argued against such awards, while the Commission on Human Rights and Opportunities, as well as lawyers representing plaintiffs, have argued in favor of them.

The Connecticut Supreme Court has now settled the issue in a case involving a United Parcel Service driver who claimed his dismissal constituted discrimination based on his disability. A jury agreed with him, and among other things awarded him $500,000 in punitive damages. The trial judge set aside that award, and an Appellate Court panel upheld the trial judge's decision. On the last day of its 2016 session, our Supreme Court affirmed that result.

You would think the law was clear on this subject, but it isn't. It doesn't specifically mention punitive damages, but it says a successful plaintiff may be entitled to such legal and equitable relief as the court deems appropriate, "including but not limited to" an injunction, attorney's fees, court costs, etc. Since punitive damages are a form of legal relief, the plaintiff argued the legislature must have intended to allow such damages.

The Supreme Court noted, however, that there are several other statutes in which the legislature specifically authorized punitive damages, thereby demonstrating that it knows how to authorize an award of punitive damages when it intends to do so. The court declined to imply such authorization in the absence of statutory language or legislative history demonstrating such intent.

This decision does not dramatically change the employment litigation landscape because in various situations federal law permits punitive damages even where comparable state laws don't. However, the threat of possible punitive damages has often been used by plaintiffs' lawyers and the CHRO to try to leverage a more attractive settlement in employment discrimination cases at the CHRO, and now that threat is gone.

Our advice to employers has always been to consider how a proposed discharge or other adverse employment action would look to an objective third party. Situations where a plaintiff's lawyer can paint a persuasive picture of retaliation, bias, unfairness or rush to judgment can lead a judge or jury to "throw the book" at an employer. This can happen even if the employer honestly thought it was within its rights, and even if punitive damages are not available.

What Constitutes a "Safe Place to Work?"

Once in a while we run across a case in which a Connecticut statute from the first half of the last century is pivotal. Section 31-49 says, "It shall be the duty of the master to provide for his servant a reasonably safe place in which to work." Although it does not provide a private right of action for employees to enforce it, that law can be used to argue that there is a public policy favoring safe workplaces.

That's what happened in a wrongful discharge case brought by an employee of Schaller Auto World who was terminated shortly after complaining that his boss was having shipments of guns delivered to his office, and keeping them under his desk without locking or otherwise securing them. Schaller argued that since he was an at-will employee, he could be terminated for any reason as long as it wasn't an illegal one.

However, the plaintiff pointed out that even an at-will employee can't be fired under circumstances where it violates a clearly established public policy, and pointed to Section 31-49 to show that Connecticut has a public policy that requires a safe workplace. He argued that keeping several guns (including AR-15s) in a car dealership that is open to the public is potentially hazardous to both employees and the public. The judge thought the argument had sufficient validity to deny the employer's motion to dismiss the case.

The judge also ruled that the termination could constitute a violation of Section 31-51q, Connecticut's free speech law, which protects the right of employees to express themselves on matters of public concern, including but not limited to political matters. Citing various cases from other courts in other states involving statements about gun control, he concluded that "firearms are a matter of public concern."

An employer might still prevail in a situation like this if it could show that the employee's speech materially interfered with his job performance or his working relationship with his employer. However, the court's opinion suggested that would be difficult in this case, since the termination occurred before there was any opportunity to assess how the employee's complaint affected his job, if at all.

Our opinion is that while an employer shouldn't have to consult his or her lawyer every time he or she fires someone, Schaller should have anticipated problems with this decision. Most dismissals are the result of poor performance, misconduct, or position elimination. In situations where none of these factors are involved, a little risk assessment, possibly including consultation with an employment lawyer, can save a lot of trouble and expense down the road.

Drug Testing is Back In the News

A while back we reported on a case where a court ruled that Connecticut's drug testing law does not apply to hair follicle testing, because on its face it is limited to urinalysis drug testing. Some employers understandably took that to mean that hair follicle testing, even when required of current employees (not just applicants), and even when there is no reasonable suspicion of drug use, is okay. Based on a recent decision by one Superior Court judge, however, that may not be the case.

A machine operator who passed a urinalysis drug test when he was hired was required to submit to hair follicle drug testing when a new owner took over the company. He and many co-workers failed the test, and several were fired. The machine operator sued on various grounds, and the employer moved to dismiss some of those

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counts. The judge found that at least two of those counts had merit, in a decision that has some employment lawyers raising their eyebrows.

One of the counts alleged invasion of privacy, or "unreasonable intrusion on the seclusion of another." The employer argued that such a claim requires a physical intrusion that would be highly offensive to a reasonable person. However, the judge said that some courts have held that physical contact is not required to establish an invasion of privacy, and whether the intrusion would be "highly offensive to a reasonable person" is a decision to be made by the trier of fact when the case goes to trial.

The other count alleged that the plaintiff's discharge constituted a violation of public policy. The judge pointed out that this claim is only cognizable in situations where the plaintiff has no statutory remedy available. Because Connecticut's drug testing law only applies to the urinalysis method of testing, and there is no statute regulating hair follicle testing, she said that second count also had merit.

But wait, what public policy was allegedly violated here? Was the plaintiff claiming that the statutory limits on urinalysis drug testing somehow indicated a legislative policy against any type of drug testing? Was he arguing that hair follicle testing may unfairly disclose drug use long ago, perhaps even before the employee was hired? The judge's decision doesn't say, so we are left to guess.

Our advice to employers is to think carefully before using hair follicle drug testing in lieu of urinalysis. The latter is subject to statutory restrictions, but is more widely accepted. It also produces results that are limited to reasonably current drug use, which is what most employers are concerned about. Further, even though most people would consider it much more intrusive on personal privacy than testing hair follicles, it carries statutory approval if done properly, and under appropriate circumstances.

Legal Briefs *and Footnotes*

Title VII and Sexual Orientation: The federal law banning sex discrimination doesn't explicitly address discrimination based on sexual orientation, but some federal courts have said that bias based on sexual orientation is by implication bias based on sex. Now a federal district judge in Connecticut has agreed with that logic. The case involves a lesbian first grade teacher alleging a hostile work environment and retaliation by her superiors. The decision has somewhat limited significance in Connecticut, since our state law already prohibits employment discrimination based on sexual orientation.

Tribal Immunity Tested: Like other tribes recognized by the federal government, the Mohegans enjoy sovereign immunity similar to that of federal and state governments. But does that immunity extend to their employees, especially when they're engaged in a commercial activity off the reservation? The driver of a limo carrying patrons home from the tribe's casino claimed that because the tribe had agreed to indemnify him from liability resulting from his work, and therefore any damages would ultimately be borne by the tribe, he was immune from a suit brought by a couple injured when he ran into their car. Last year the Connecticut Supreme Court agreed with the driver, whose position was supported by more than a dozen other tribes, while the

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federal government filed a brief supporting the plaintiffs. However, the U.S. Supreme Court has agreed to hear the case, so we should have a final answer by June.

What is a "Motor Vehicle"? Workers' compensation law usually provides the exclusive remedy for employees injured on the job, but there's an exception for injuries caused by a co-worker's negligent operation of a "motor vehicle." A construction worker tried to use that exception to sue his employer when he was injured by a co-worker driving a Bobcat, a vehicle used to excavate and load material at construction sites. A judge turned him down, ruling that in the context of our workers' compensation law, the term "motor vehicle" means a car or truck that operates on public roads and highways.

St. Francis Must Fund Pension: A Catholic hospital in Hartford has agreed to settle a class action lawsuit over pension funding for $107 million. St. Francis Hospital and Medical Center had taken the position that as a church-affiliated institution, it was not bound by ERISA requirements like other employers. Church plans are exempt from federal regulations, but there are no cases in the federal circuit that includes Connecticut that provide guidance on whether this exemption extends to other church-related entities. This settlement benefits roughly 7200 employees.

State's Lawyers Unionize: Assistant Attorney Generals, almost 200 of them, have voted to join a union, and to be represented by AFSCME. Apparently they have not had a salary increase in several years, and perhaps there are benefits enjoyed by unionized employees in state government that they would like to have as well. A handful of lawyers asked to be excluded from the unit on the ground that their work is managerial, but the State Board of Labor Relations has ruled that they have no standing to raise the issue.

Wage and Hour Lesson Learned: It seems that in almost every issue we mention another example of just how costly it can be to flout wage and hour rules. The latest is a federal court decision awarding a group of food service workers in Connecticut over $175,000 because they were told not to record hours worked over 40, and threatened with discharge and deportation if they reported the situation to authorities. Because one of the executives of the operation, known as Gourmet Heaven, was personally responsible for hiring, supervising and compensating the employees, he was held personally liable along with the business. Further, because both state and federal laws were violated, the plaintiffs were entitled to punitive damages under the Connecticut Minimum Wage Act as well as compensatory damages under the Fair Labor Standards Act.

Surveillance Supports Suspension: These days we often see video surveillance tapes documenting criminal or terrorist acts. However, such evidence can also be used to support employee discipline. A good example is the case of a Bridgeport police officer who was accused of rule violations and excessive use of force in the course of an off-duty arrest. He grieved his 30-day suspension, but in arbitration the City presented videotape from a liquor store surveillance camera showing that he had not only engaged in misconduct, but also lied about it. The panel of arbitrators unanimously upheld the discipline.

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