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Employment Law Letter

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Labor & Employment Practice Group

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Is a Volunteer an Employee For Discrimination Law Purposes?

Many kinds of businesses use volunteer help, ranging from hospitals to performing arts organizations to various social services agencies. Some entities run almost entirely on volunteer services, such as volunteer fire and ambulance companies. Certain organizations offer modest compensation, such as reimbursement of expenses or job-related perks.

But when a dispute arises, such as a claim of workplace discrimination, do the laws applicable to employees apply? Two recent Connecticut cases addressed that question in different contexts, and while both employers prevailed, they did so by adopting opposite positions on the issue.

In one case, an ambulance company volunteer claimed she was the victim of race discrimination when she was voted out of the company in a membership meeting. The CHRO brought suit on her behalf, but an Appellate Court panel rejected the claim. They adopted a test for "employee" status that has been used in other jurisdictions, including the federal courts, namely whether the individual receives substantial compensation for his or her services.

The ambulance worker's attorneys argued that the court should apply the "right of control" test, which is used to determine whether someone is an employee or an independent contractor. However, the court said that test only applies where it has been established that a worker is in fact an employee, and the only question is whose employee he/she is. Here, there was no need to address the "right of control" test, because a volunteer is not an employee.

Ironically, in the other case the employer argued that Connecticut's law on age discrimination *does* apply to volunteers. That case involved a claim filed with the CHRO by a deputy chief in the Glastonbury Fire Department, which is largely staffed by volunteers. Police and fire employees are exempted from our state's statute prohibiting mandatory retirement, because the ability to respond to physically demanding and in some cases life-threatening emergencies is an essential element of the job.

In the Glastonbury case, the fire department argued that the exemption applied to the deputy chief even though he was a volunteer. The CHRO Human Rights Referee agreed that the provision in the Fair Employment Practices Act allowing mandatory retirement of police officers and firefighters was intended to apply to employees and volunteers alike.

Our opinion is that both rulings are correct. Employment discrimination laws were clearly intended to benefit only those who are truly employees. However, it would make no sense to allow mandatory retirement of paid emergency workers, but not volunteers.

Don't Use "Just Cause" Except In Union Contracts

Practically every collective bargaining agreement covering public or private sector workers describes the standard for discipline or discharge of an employee as "just cause." When there's a dispute, that phrase almost invariably ends up getting interpreted by labor arbitrators who have considerable experience applying that standard, so union and management representatives at least have an educated guess about how a case will turn out.

As the East Hartford Housing Authority recently found, however, the same is not true when the term "just cause" is used in the employment contract of a non-union employee. When it fired its executive director, he brought a lawsuit, and a jury ended up deciding what did or did not constitute "just cause" for his dismissal.

The dispute started because of a letter alleging an improper relationship between the executive director and a subordinate, but later focused on allegations that he did not work well with the Authority's board. The employer's case was not helped by the testimony of some of its witnesses, but a key factor in the decision was the court's instruction to the jury that in order to prevail, the employer had to demonstrate that the reason for the discharge was not just a "legitimate" reason, as the Authority claimed, but a "substantial" one.

Obviously, reasonable people could differ about the meaning of that term, but the jury in this case found the Authority's decision did not meet that standard, and awarded the executive director over $100,000 in economic damages. Further, they awarded another $100,000 in non-economic damages for emotional distress, perhaps in part because the Freedom of Information Commission found that the Authority's board violated the law when it held an improper secret meeting about him.

Our advice to employers is to be as specific as possible about the reasons for termination when drafting an employment contract for a non-union employee. Even where it makes sense to allow for some flexibility, including examples of the kind of conduct that can result in discharge provides some guidance to a court regarding the intent of the parties in the event of litigation. It is also helpful to allow for a termination "without cause" upon payment of a specific amount of severance, because if a situation arises where the justification for dismissal could reasonably be subject to question, payment of severance is often less expensive than litigation, win or lose.

Are Courts Getting Tough On Disability Claims?

In our last issue we reported on a Connecticut Supreme Court decision holding that state law prohibits employment discrimination based not only on actual disability, but also on a perception of disability, even though it doesn't explicitly say so, as federal law does. However, some more recent cases indicate that proving a claim of job bias based on perceived disability may not be as easy as it seems.

A newly hired Bridgeport police officer was relieved from duty after episodes where she became "irrational, irate and uncooperative." She was also wary of crowds and suspicious of people, and did not get along with co-workers. After an evaluation by a clinical psychologist who said she showed a "fake good" profile, she was terminated. Although she claimed the department perceived her as having a mental disability, a court concluded she was simply

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viewed as having a temperament that was not suited to police work, rather than a mental disability recognized by the American Psychiatric Association, and dismissed her claims. Her case was dismissed.

Courts are also looking more closely at situations where employees claim they are capable of working, even though they are seeking disability benefits in another forum. Two Connecticut health care workers recently had their employment discrimination claims thrown out of federal court because they had applied for Social Security disability benefits. The judges in both cases said they were estopped from claiming they were qualified to perform their jobs when the Social Security Administration had found them to be disabled.

Some disability claims even fail because they are trumped by someone else's disability rights. In a case of "dueling disabilities," a cab driver was fired after he refused to pick up a passenger from Bradley International Airport because he had a service dog. Although the fear of dogs is a recognized mental disability in the diagnostic manual used by the courts, a Superior Court judge said the driver wasn't capable of performing the essential functions of his job if he couldn't transport people who have service animals.

Our opinion is that many aspects of employment discrimination law are getting more and more complex, but at least there are some decisions out there that establish more rigorous standards for successfully playing the disability (or perceived disability) card, and therefore make life a little easier for employers.

Legal Briefs
and Footnotes

Casino Exempt From ADEA:
An employee suing the Mohegan Sun Casino for age discrimination had her case dismissed by a federal court holding that businesses owned by Native American tribes are not subject to the Age Discrimination in Employment Act. The decision raised some eyebrows because unlike Title VII of the Civil Rights Act, the ADEA contains no express exemption for Indian tribes. The court relied instead on sovereign immunity principles.

Party-Appointed Arbitrators:
Everyone knows that appointees to interest arbitration panels under Connecticut public sector bargaining laws are partial to the positions of the party that appointed them. However, a Superior Court judge has ruled that the Waterbury Police Union went too far when it designated the lawyer who had represented it in negotiations to serve as its appointee to an impasse resolution panel. The judge said such an arbitrator would be perceived as irreconcilably biased, which would undermine the public perception of the integrity of the process.

Non-Renewal vs. Discharge:
Connecticut's Free Speech Law, Section 31-51q, protects employees from "discipline or discharge" for exercising rights guaranteed by the first amendment to the U.S. Constitution. In a decision that surprised some observers, a Superior Court judge has ruled that neither non-renewal of the employment contract of a non-tenured teacher, nor failure to grant tenure to such a teacher, constitutes discipline or discharge. The judge said these terms apply only to actions by an employer that adversely affect some status or benefit that the employee has already attained.

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Recommendation Requirement:
In another surprising decision, a different Superior Court judge has ruled that when ground rules for collective bargaining state that the negotiating teams will recommend to their respective memberships approval of any tentative agreement reached by the negotiators, failure of any member of a team to join in such recommendation constitutes a failure to bargain in good faith. After the Bristol Board of Education failed to ratify a blue collar contract that one of its negotiators said he was "having trouble" with, and voted no, the State Board of Labor Relations ordered the parties to implement the contract, and the court upheld that order.

Defamation Lesson Learned:
In a recent issue, we warned about the dangers of making negative statements regarding employees and former employees. An aviation company learned that lesson the hard way when it was socked with damages after it criticized a former employee in communications with a prospective employer. Although it claimed its statements were privileged based on a federal law governing pilot records, a Connecticut court ruled that the privilege is lost when such statements are knowingly false. Among other things, a jury found that the company said the pilot had been subjected to a "probable cause" drug test when in fact it was random, and said that he was involuntarily terminated because of poor performance when in fact he was laid off.

Whistleblower Technicality:
When an employee was fired after reporting to authorities an alleged assault by a co-worker, a complaint was filed under Connecticut's Whistleblower Law, which prohibits retaliation for reporting a violation of state or federal law to a public body. However, the court found that the law's application was limited to reporting violations of law *by an employer*. Although the text of the statute itself contains no such limitation, the court found legislative intent in the heading of the Act: "Protection of employee who discloses employer's illegal activities."

Predicting Public Policy: We've reported before on how difficult it is to predict whether a court will find that a labor arbitration award conflicts with public policy. Two recent Connecticut cases decided within a few days of each other illustrate the point. In one case, the court found that an award reinstating a health care worker dismissed for incorrectly operating a lift, which seriously injured a disabled patient, was in conflict with public policy. In the other, the court found that an award reinstating a different health care worker, who was fired for failing to timely report possible abuse of a patient by a co-worker, did not violate public policy. Go figure.

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8:00 AM - 10:00 AM
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Stamford Office

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Wednesday, May 13, 2015
1:00 PM - 2:00 PM
Webinar

Hot Topics in Special Education - Hartford
Tuesday, June 2, 2015
7:30 AM - 10:00 AM
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