SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

Employment Law Letter

Winter 2018

Labor & Employment Practice Group

www.shipmangoodwin.com

UCHC Can't Escape Liability for Sexual Harassment

2017 was not a good year for the University of Connecticut Health Center when it comes to labor and employment litigation. First the state Supreme Court upheld the decision of a labor arbitrator reinstating an employee who was fired for smoking pot on the job, on the clock and in a hospital vehicle. Then just before Christmas, a federal appeals court rejected a claim by the Health Center that it should not be liable for a $125,000 sexual harassment verdict by a jury in favor of a dental assistant.

UCHC argued that it could not be held responsible because the harasser was a doctor who was not the assistant's supervisor, and the Health Center had no knowledge of the harassment. The court noted, however, that the doctor had engaged in similar misbehavior a few years earlier, and in fact was subject to a last chance agreement as a result of that conduct. Also, the assistant's supervisor had heard reports of a "situation" in the dental clinic and had not conducted a proper investigation. Therefore, the court said the Health Center should have been aware of the problem.

Interestingly, UCHC had a sexual harassment policy that provided an avenue for complaints, but the dental assistant had failed to file a complaint, even though the harassment had gone on for some time, and had escalated from comments about her appearance and questions about her personal life to inappropriate emails and touching. The judges said none of this excused the Health Center's failure to act, even when it had reason to believe there was a problem.

Our advice to employers, given the focus on this issue in today's society, is that steps that may have provided insulation from liability in the past may not be sufficient to do so now. Having a sexual harassment policy is not enough, and mandatory sexual harassment training is not enough. Focus on supervisor/supervisee relationships is important, but harassment by co-workers can also lead to liability. "Zero tolerance" sounds nice, but employers have to walk the walk as well as talk the talk.

Attorneys' Fees Can Dwarf Damages In Bias Cases

When assessing the risks associated with defending employment lawsuits, don't forget to factor in the possibility of an award of substantial attorneys' fees if you lose the case. A December decision in a Walmart case illustrates the point.

An African-American employee in Walmart's Waterford office complained of discrimination

when he was laid off in a 2010 downsizing, and was thereafter rejected for more than a dozen similar openings, which he claimed constituted retaliation for his complaint of discrimination. Earlier in 2017, a jury rejected his discrimination claim but found in his favor on his retaliation claim. They awarded him $5.5 million in damages, an amount that was cut to $300,000, which is the maximum allowable under Title VII of the Civil Rights Act.

In the December decision, a federal judge awarded approximately $1 million in attorneys' fees and costs, rejecting Walmart's claims that the employee's lawyer had run up excessive charges related to issues on which she did not prevail. The court held that given the lawyer's "skill, experience and relative success" in the jury trial, her hourly rate of $500 was not unreasonable.

Attorneys' fees are not available in all employment cases, but when they are, they can add up to multiples of the employee's economic damages, such as lost wages and benefits. In the Walmart case, they were over three times the maximum damages payable to the employee.

Our opinion is that employers should consider a variety of factors when deciding whether to fight a case or settle, including the risk that even a modest settlement could encourage other employees to bring similar claims. However, while employers usually include the cost of their own legal defense in the equation, they shouldn't forget to include the potential cost of the plaintiff's counsel if the case doesn't go their way.

FLSA Settlements Must Follow Rules

In a span of just two short weeks late last year, three decisions by federal judges in Connecticut provided important lessons on the terms and conditions necessary to settle wage and hour cases brought under the Fair Labor Standards Act.

In the first ruling, the judge rejected a proposal submitted by the parties, after engaging in mediation, to settle a case privately without recording the settlement on the public docket. Citing other decisions by judges in Connecticut and neighboring states, he said that because the FLSA requires approval of settlements by the court, there was a strong presumption in favor of public access to the terms, notwithstanding the preference of the parties.

Two weeks later, after the parties had filed their settlement agreement, the same judge refused to approve it, citing three reasons. One, the agreement contained a release clause that went beyond the claims that were asserted in the suit. Two, it included a confidentiality agreement that prevented the plaintiff from discussing the settlement, which violated the principle discussed in his previous ruling. Three, the agreement failed to detail the employee's alleged damages, which meant the judge had no way of determining whether the settlement amount was reasonable under the circumstances.

In the week between those two rulings, another federal judge refused to approve a settlement between a Fairfield home care agency and a live-in caregiver, who it had impermissibly paid on a per diem basis rather than an hourly rate. Once again, the judge's reason was that the agreement

contained provisions regarding release of claims that were broader than the allegations in the lawsuit, and a class action waiver broader than that permitted by precedent.

Our advice is to consider settlement of employment-related claims as early in the process as possible, preferably at the administrative level before a lawsuit is filed. Nothing prohibits out-of-court settlement of any employment disputes, including wage and hour claims. However, once a dispute governed by the FLSA becomes a formal lawsuit, it becomes harder to resolve the matter confidentially, or in a manner that prevents the plaintiff from bringing other claims against the same employer.

What is Comparable Insurance Coverage?

Collective bargaining agreements covering public employees in Connecticut often provide for health insurance for retirees. In some cases, those contract provisions say retirees shall be covered by the same plans as active employees, but others say retirees will get coverage that is the same as, or comparable to, the plan in effect at the time they retired.

Given how quickly the world of health insurance has evolved recently, any knowledgeable employer would avoid committing to the "same" coverage for an indefinite period of time, but what is meant by the term "comparable"? What if the terms of the plan are the same, but the carrier is different so the network of participating providers or approved drugs is different? What if co-pays are lowered for preventive care, but are increased for some other medical services?

The latter scenario was presented to a panel of Appellate Court judges in a case brought by a group of retirees from the Town of Bloomfield. They rejected the plaintiffs' claims, finding that the term "comparable" did not mean identical. While it was true some co-payment requirements had been increased, others (such as preventive care and routine eye examinations), were reduced to zero.

In a related development, a Superior Court judge recently rejected a request for an injunction brought by a group of police and fire retirees in Torrington when the municipality adopted an insurance plan with new deductible requirements. They claimed the change violated a promise they would not have to pay more for coverage than they did at the time of their retirement. Without deciding the merits of their claim, the judge said they were not entitled to an injunction because the change did not constitute "irreparable injury." In other words, if they ultimately win their case, money damages will make them whole.

Our opinion is that any contractual health insurance provision that restricts an employer's right to make reasonable changes in retiree cost or coverage is problematic. This is especially true in the public sector, where employees often retire with future life expectancies of up to 40 years or more. What is the justification for providing retirees with a better health insurance plan or a lower cost than they would have enjoyed if they had kept working? Of course, some such provisions may have been imposed by binding arbitration panels under Connecticut's public sector bargaining laws, but that doesn't mean they are reasonable or justifiable given the economic circumstances that public employers are facing today.

SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

ALYCE ALFANO
ANDREANA BELLACH
GARY BROCHU
BRIAN CLEMOW*
LEANDER DOLPHIN
KEEGAN DRENOSKY
BRENDA ECKERT
CHRISTOPHER ENGLER
JULIE FAY
MELIKA FORBES
BEN FRAZZINIKENDRICK
SUSAN FREEDMAN
SHARI GOODSTEIN
GABE JIRAN
ANNE LITTLEFIELD
JARAD LUCAN
PETER MAHER
ASHLEY MARSHALL
LISA MEHTA
ASHLEY MENDOZA
RICH MILLS
TOM MOONEY
PETER MURPHY
SARANNE MURRAY
JESSICA RITTER
KEVIN ROY
REBECCA SANTIAGO
DANIEL SCHWARTZ
ROBERT SIMPSON
JESSICA RICHMAN SMITH
GARY STARR
CLARISSE THOMAS
CHRISTOPHER TRACEY
LINDA YODER
HENRY ZACCARDI
GWEN ZITTOUN

* Editor of this newsletter. Questions or comments? Email bclemow@goodwin.com.

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

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

265 Church Street - Suite 1207
New Haven, CT 06510-7013
203-836-2801

400 Park Avenue - Fifth Floor
New York, NY 10022-4406
212-376-3011

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

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

www.shipmangoodwin.com

Now We've Seen Everything...

This story caught our eye. A woman was riding her bike along her usual route when President Trump's motorcade passed by on his way back from a golf outing. Presumably expressing her personal opinion about the current occupant of the Oval Office, she repeatedly gave a middle finger "salute". Her gesture was caught by a White House photographer, and the photo went viral on social media.

Some who saw it were amused, but that apparently did not include the woman's employer. Akima LLC is a federal government contractor, and was concerned that the incident might result in lost business. They fired the woman, claiming she violated their social media policy by using the picture as her profile picture on Facebook. She pointed out that male employees had posted similarly lewd material on social media and had not been disciplined.

The press report does not say whether the woman plans to take legal action, but it's not hard to imagine a long line of plaintiff's lawyers eager to take her case. One wonders how such a lawsuit might turn out in a state like Connecticut, which has a statute (Section 31-51q) that prohibits employers from disciplining or discharging employees because of the exercise of their first amendment rights.

Our opinion is that the outcome of a lawsuit, if there is one, might turn on the fact that the employee was terminated not for the middle finger gesture itself, but for the fact that she seized on a photo taken by someone else to advertise her lewd action on social media. However, if it is to have a reasonable chance of prevailing on that theory, Akima will have to overcome the woman's claim that male employees have not been penalized for similar offenses.

Legal Briefs *and Footnotes*

Intern test simplified: The U.S. Department of Labor has abandoned its complicated six-factor test for determining whether an intern qualifies for employee status, and has adopted an "economic reality" standard that focuses on which party is the primary beneficiary of the relationship. That standard was initially developed in 2015 by the federal appeals court with jurisdiction over Connecticut. Employers that have shied away from internships in order to avoid claims that they really are employees may want to revisit the issue.

Ministerial exception applied: One manifestation of the separation between church and state in our country is the immunity of churches from certain employment-related litigation. The Archdiocese of Hartford recently dodged a discrimination lawsuit by an employee whose position the court found to be ministerial in nature. Although he was an administrative assistant, he also held the title of "sacristan" which the judge said was inherently religious. He rejected the employee's argument that the two positions should be considered separately, and that he should at least be able to pursue his discrimination claim with respect to his administrative assistant function.

Save the Date:

Sexual Harassment Prevention Training
February 8, 2018 - Hartford Office
April 5, 2018 - Hartford Office
April 26, 2018 - Hartford Office
April 26, 2018 - Stamford Office

2018 Labor & Employment Spring Seminar for Public Sector Employers
May 4, 2018
Hartford Marriott Downtown

Register today at
www.shipmangoodwin.com