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Employment Law Letter

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Labor & Employment Practice Group

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Workplace Speech Protections Refined by Connecticut Supreme Court

We don't generally report on developments that will likely be of more interest to lawyers than clients, but a recent decision from our state's Supreme Court justifies an exception. The case arose when an employee of UBS Realty was terminated, allegedly in retaliation for his raising issues about inaccurate valuation of real estate investments held by UBS, and other improprieties he claimed constituted violations of securities laws.

He brought suit, alleging violations of Connecticut state statutory and constitutional provisions protecting freedom of speech. His employer attempted to get the case dismissed based on the reasoning of the U. S. Supreme Court in *Garcetti v. Ceballos*, namely that federal constitutional protection of freedom of speech does not apply when an employee is talking about matters that relate to his assigned duties. The judge referred the matter to the Connecticut Supreme Court for a ruling on whether the free speech provisions of our state constitution should be interpreted in the same way as their federal counterpart.

Without going into the court's detailed reasoning, the bottom line is that the justices concluded *Garcetti* did not apply to claims brought under Connecticut law. However, they did not conclude that all job-related speech was protected to the same extent as, for example, political speech. Instead, they adopted the logic of one of the dissenting justices in the *Garcetti* case, who said that employee speech relating to their official duties was only protected if it concerned "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." They said that same standard should apply, regardless of whether the statements were made by a government worker or a private sector employee.

The UBS Realty case was sent back to the trial court for a determination of whether the employee's statements fell within that definition. Thus the employer is not off the hook entirely, as it would have been under the *Garcetti* standard, but at least has room to argue that the complaints lodged by the employee before he was terminated were not serious enough to meet the standard adopted by our state Supreme Court.

Our advice to employers who are considering taking action against an employee because of something he or she has said in the course of their job is to first assess whether the speech simply reflects a policy difference with the employer (not

protected), or a matter of public concern involving allegations of serious wrongdoing (protected). If the answer is less than clear, the prudent approach may be to find some other way to address the situation.

Accommodating Religious Beliefs is Complicated

One of the common problems in making allowances for the religious beliefs and practices of employees is adjusting their schedules as required by their faith, whether it means a particular day off each week or breaks during the workday for prayer. For example, a few years ago an employee of Connecticut's Department of Developmental Services demanded a schedule that allowed him to participate in religious observances, but declined to exercise his seniority to choose a schedule which accomplished that result. Presumably the available options had elements he didn't like.

Recently a federal appeals court rejected his claim. The judges said an employer is not required to incur overtime costs, or inconvenience other employees, in order to grant a worker the particular accommodation he requests. An important factor in the decision appears to have been the fact that the employee was covered by a union contract that spelled out his rights and those of his co-workers, and his requested accommodation would have violated the contractual rights of other union members.

However, the situation is very different if the accommodation costs the employer nothing, and no co-workers are impacted. A clear example is the well-publicized decision in which Abercrombie & Fitch was recently found guilty of religious discrimination against a Muslim job applicant who wore a headscarf. The company said this did not fit the image it wanted to convey, but the courts gave that claim short shrift. The same result would likely apply to other religion-based headgear or apparel.

Another battle employers likely cannot win is a dispute over what constitutes a religious belief. Last month the EEOC won a lawsuit on behalf of an Evangelical Christian mine worker who objected to using his employer's hand scanner to track time and attendance, since he associated it with a system used by followers of the antichrist known as "the mark of the beast." Religious beliefs do not have to be generally accepted or even rational in order to be protected, in the view of the EEOC and the courts.

Our opinion is that unless an employer can prove an employee's claim of religious belief is dishonest, the safest route is to accept it at face value. For example, many healthcare entities have concluded it is likely unavailing to question an employee's religious objection to flu vaccination, and the better approach is to simply require him or her to wear a mask as a protection against contracting or spreading the disease.

Old Law Gets New Interpretation

It's probably safe to say that none of today's employment lawyers were practicing in 1949, when the General Assembly enacted Connecticut General Statutes Section 31-49, captioned "Care required of a master for his servant's safety." The law, which is rarely cited today, says a "master" must provide "his servant" with a reasonably safe workplace, and "fit and competent persons as his colaborers" and his "vice-principal" (i.e. supervisor).

Most practitioners have assumed the old law only applies if a worker is injured because of an unsafe workplace or incompetent people to work with. In most cases, therefore, the matter is dealt with through the workers compensation system rather than this arcane statute.

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However, a creative plaintiff's attorney has convinced a judge that the law also protects workers against emotional distress caused by unfit co-workers or supervisors. The case involved a Stanley Black & Decker employee who complained of a verbally abusive manager. She claimed she should not have to repay a $5000 signing bonus, despite the fact that she resigned before completing the two years of work necessary to earn it, because the company permitted her supervisor to engage in harassing and abusive behavior.

Although the court did not recognize a private cause of action based directly on Section 31-49, it said the statute set forth a public policy on which the employee could base her claim. The court concludes "that this statute requires the employer to provide to the employee a place in which to work free of physical danger and free of exposure to emotional and/or mental distress."

Our opinion is that while Stanley Black & Decker may still be able to convince the court that the employee was not mistreated by her supervisor, management must be wondering whether it would have been a wiser course of action to simply let her resign and keep her $5000. Certainly it would have been less costly than litigating the issue.

Legal Briefs *and Footnotes*

You Won't "Like" This: Last year we reported on an NLRB decision in which it found that employees of a Watertown sports bar were engaged in concerted protected activity when they griped on Facebook about their employer's tax withholding practices. They were both fired, even though one of them merely clicked "like" in response to her co-worker's obscenity-laced tirade. Now a federal appeals court has upheld that decision, including the Board's requirement of reinstatement with back pay. While acknowledging that customers of the bar probably saw the Facebook postings, the court pointed out that nothing in the exchange was intentionally false, nor was it likely to damage the employer's brand or drive customers away.

Hair Follicle Drug Test Okay: An engineering firm terminated an employee after he failed a drug test based on a hair sample, and he sued claiming a violation of Connecticut's drug testing law. However, a Superior Court judge has ruled that the law on its face is limited to urinalysis drug testing, and even though it may seem illogical to restrict some forms of drug testing and not others, it's up to the legislature to address that issue, not the courts. The judge's decision doesn't say whether the testing was random or uniformly required of all employees, but presumably the same logic would apply in either case.

Kleen Energy Workers Sue: Remember the 2010 explosion at a power plant in Middletown that killed six workers and injured dozens of others? Well, it also left many employees without jobs, even though they were not injured and were capable of working. Forty-five of them have brought suit, alleging that those responsible for the explosion owe them for their lost earnings. This may be the only case in recent memory where employees have requested damages even though they suffered no physical or emotional harm, and suffered no adverse employment action at the hands of their employer.

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What Accommodation is Reasonable? Most employers that are subject to the Americans with Disabilities Act or the Connecticut equivalent have had to grapple with that question. It doesn't help that plaintiffs' lawyers keep pushing the envelope. A good example is a lawsuit filed against Sikorsky Aircraft on behalf of a deaf employee who claims he should be provided with a full-time interpreter so he can communicate with co-workers. Although Sikorsky offered other assistance, such as software programs the employee could use on his phone, he claimed these were inadequate. There is scant precedent for requiring the hiring of two employees to accomplish one job, and even some advocates for the deaf think this claim is a stretch. It will be interesting to see the outcome.

Be Careful What You Say: Hardly a month goes by without a decision from the Connecticut courts that drives home the lesson that casual remarks to employees can come back to haunt you in a lawsuit. The latest example involved a 62-year old manager who was fired and replaced with a 49-year-old. That by itself might not be enough to create an inference of age discrimination, but in the months prior to the termination the manager's boss said "your generation should be able to do research," and "the future of the company is with the youth," as well as similar statements. That was enough to convince a judge that a reasonable juror could infer from the boss' comments that age was a motivating factor in the termination decision.

Symphony Faces NLRB Hearing: It's no secret that the Hartford Symphony Orchestra has been having financial troubles, despite the transfer of its management to the Bushnell Center for Performing Arts. Accordingly, they tried to reduce the number of guaranteed practices and performances for their unionized musicians, and reduce their pay by a commensurate amount. However, the union alleges that management sent out proposed contracts reflecting these changes without discussing them with the union first, despite the fact they were engaged in negotiations for a new collective bargaining agreement at the time. The NLRB has taken the position that the Symphony is therefore not negotiating in good faith, and has scheduled a hearing for mid-November if the parties cannot work out a resolution before then.

Fall Seminar Materials Available: More than 160 guests joined us for the Shipman & Goodwin Labor and Employment Fall Seminar on October 23. The presentations covered various hot topics (in three minutes or less); an advanced course on FMLA compliance; the NLRB and your employee handbook; and medical marijuana in the workplace. If you were not able to join us, but would like a complimentary copy of the materials, you may access them electronically at: www.shipmangoodwin.com/leseminar. If you know of others who may be interested, feel free to pass on this information.

Save the Dates:

Sexual Harassment Prevention Training

Tuesday, December 1, 2015
8:00 AM - 10:00 AM
Hartford Office

2015 Update on Data Privacy and Human Resources Law

Tuesday, December 11, 2015
8:00 AM - 11:00 AM
Hartford and Stamford Offices

Register at www.shipmangoodwin.com by clicking on the appropriate date on our events calendar.