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Employment Law Letter

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Labor & Employment Practice Group

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Kleen Energy Workers Can't Sue for Lost Wages

In our last issue, we reported on an interesting lawsuit filed by about 50 plant construction workers who were out of work for months following an explosion resulting from a "gas blow" at the Kleen Energy facility in Middletown in 2010. Though none of the plaintiffs were injured, or suffered any property damage, they claimed roughly $1 million in lost wages.

Now the Connecticut Supreme Court has ruled that the workers can't sue either Kleen Energy or the contractors they claimed were responsible for the explosion, because none of the defendants owed them a "duty of care" related to their earnings. If they had suffered personal injuries or property damage, they could have sued for their losses, but the justices unanimously ruled there was no legal precedent that allowed them to collect for lost wages alone.

Although courts in some other states have reached a similar conclusion, this appears to be a case of first impression in Connecticut. The court expressed concern that, if such lawsuits were allowed, there could be "a significant increase in litigation." The court also doubted that there would be "a corresponding increase in the safe operation of industrial sites," since they are already regulated by OSHA and other agencies.

Further, how direct would the causation have to be? If the Kleen Energy workers could recover lost wages, could a neighborhood restaurant where the workers used to eat also sue for their losses? The court also pointed out that the plaintiffs were eligible for unemployment compensation, so it's not as if they had no remedy at all.

Our opinion is that the Supreme Court got this one right. If employees could sue for lost wages whenever some accident put them out of work, even though they suffered no personal injury or property loss, court dockets would become even more clogged than they are. There was more than enough litigation as a result of the six deaths and 50 injuries caused by the Kleen Energy blast.

American Medical Response Loses Another NLRB Fight

AMR, the New Haven based ambulance company, just can't seem to catch a break from the National Labor Relations Board. A few years ago, they were forced to settle with an employee they fired after she badmouthed her supervisor on Facebook. In what was then a groundbreaking case,

the Board took the position that when an employee communicates with co-workers about workplace issues via social media, he or she is engaged in concerted protected activity, and cannot be subjected to discipline or other adverse action as a result.

More recently, AMR fired an employee who it claimed was encouraging other employees to engage in a work stoppage. The employee objected to a change in operating procedures that required drivers to perform a vehicle check (fluid levels etc.) at the start of their shift. He said he didn't feel comfortable with these duties and encouraged others to consult a mechanic if they felt the same way. Because he was a union steward, AMR felt he was encouraging others to engage in a concerted refusal to do their jobs, but the NLRB found just the opposite, namely that he was simply carrying out his duties as a steward.

It didn't help that AMR had implemented the new procedure without negotiating with the union, or even notifying it in advance. The NLRB ruled that this violated the duty to negotiate before implementing material changes in working conditions. Interestingly, AMR did not challenge the Board's conclusion in that regard.

AMR did, however, seek to set aside the NLRB's decision on the discharge, and argued the matter before a panel of the U.S. Court of Appeals. In a brief decision, the judges gave management's arguments short shrift. They said the Board's conclusions were "adequately supported by the record." The panel also rejected AMR's claim that the Board should have deferred the matter to arbitration under the contractual grievance procedure. While "there is ordinarily a presumption in favor of arbitration," the court said the Board had found evidence that the union might not have defended the employee's position as aggressively as they should.

Our advice to all employers, including those without a union, is to take careful note of the NLRB's reasoning with respect to the discharge issue, because they would likely have taken the same position if the dismissal had occurred in a non-union environment. That is, as today's Board members see it, employees have a right to engage in concerted protected activity whether there is a union in the picture or not. Even public employers should pay attention, since our State Board of Labor Relations generally follows the lead of the NLRB.

Boss Dodges Lawsuit by Worker with AIDS

Employers can get in serious trouble for disclosing medical information about an employee to co-workers or other third parties without a legitimate need to know, especially if the information has the potential to damage the employee's reputation, as could be the case with AIDS. However, the employee first has to show that he or she didn't divulge the information him/herself.

An employee of a Suffield-based tree service recently failed to convince a judge that his employer had disclosed to co-workers the fact that he had AIDS, and that he had been subjected to verbal abuse and harassment based on his presumed sexual orientation as a result. The judge credited the testimony of other employees that the plaintiff himself had discussed his condition with co-workers.

There may be situations where an employer has to discuss an employee's health condition with others, for example where the cooperation of co-workers is necessary to assure that an employee with a disability is afforded an appropriate accommodation, or where co-workers need to take safety precautions to avoid harm to the employee or to themselves. Even then, however, the preferred course of action is to obtain the employee's consent first.

Connecticut law is clear in protecting employees against unauthorized disclosure of

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medical information, and many employers take precautions to avoid it, such as maintaining medical files separately. Where it is necessary for a supervisor to know about the health condition of a subordinate, he or she should be cautioned against sharing that information with others.

Our opinion is that if word gets out about an employee's personal health condition, such as their HIV status, it may be very difficult to prove whether the source of that information was the employer or the employee. Therefore the safest approach is not to discuss such matters at all unless it is absolutely necessary, and then only with the employee's documented consent.

Nepotism Policies are Necessary, but Tricky

Many larger employers have policies designed to avoid complications arising from relatives working together, or especially supervising each other. Unless an organization is family owned and operated, there can be serious morale and other problems arising from the treatment of relatives within the same work unit, ranging from a supervisor giving benefits to his son or daughter to one spouse objecting to the discipline of the other.

Presumably the Shelton Board of Education had such concerns in mind when it adopted a policy prohibiting the employment of spouses in the same building with each other. However, it is now facing a lawsuit brought by a high school teacher who married another teacher in the same school, and as a result was transferred to what she says is a less desirable assignment in another school. She is alleging discrimination based on marital status.

This case raises some interesting questions. Why does the policy apply to married couples, but not to people who are engaged, cohabitating, or even just dating? If the policy were to be expanded to include some of those categories, would that make it more or less objectionable? Assuming there's some logic to refusing to hire relatives to work in the same school, does the same logic apply if they already worked there before they became related? And in this case, why was the wife transferred instead of the husband? They were both hired the same year, so it wasn't a seniority issue. Was it gender discrimination, especially since the wife's former position was filled by a male?

Most nepotism policies focus on supervisory relationships, for obvious reasons. The potential for favoritism, whether real or simply perceived, is significant. Shelton's policy also addresses supervisory relationships, but produces a seemingly inconsistent result. That is, married teachers can't work in the same school, even if they are in non-supervisory positions in different departments, but the policy doesn't prohibit a teacher from living with or even being engaged to the principal who supervises and evaluates him or her.

Our advice to most employers is to have a nepotism policy, whether formal or otherwise, but to apply it with some flexibility based on the facts of any given case. Admittedly that can lead to claims of favoritism or discrimination, but most lawyers would rather defend an individualized decision based on careful thought and logic than a rigid policy that produces inconsistent or even irrational results.

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Legal Briefs
and Footnotes

Municipal Pension Revoked: In one of the first reported decisions under a 2008 law authorizing the reduction or elimination of the pension benefits of state or local government employees convicted of criminal offenses related to their work, a former supervisor for the town of Redding has had his pension revoked by a Superior Court judge. He was found guilty of larceny after it was discovered that he had been selling municipal equipment and vehicles and pocketing the money, and had used municipal funds to rent equipment for his personal use.

FMLA Lessons Learned: Two recent decisions provide valuable lessons about the Family and Medical Leave Act. In one, a terminated manager couldn't pursue her FMLA retaliation case because after a fall she was only out of work for a day, and her "short-term condition" required no "continuing treatment," as is necessary for FMLA coverage. In the other, a nurse who was turned down for several positions by her employer after being cleared to return to work from an extended FMLA absence, despite decades of relevant experience, was awarded over half a million dollars in damages, attorneys' fees and costs. The lessons are that while not every employee can establish entitlement to FMLA rights, the ones that do can be very costly for employers who violate those rights.

ABC Test Clarified: One of the tests for independent contractor status requires that the individual be customarily and regularly engaged in the same type of work performed for the business with which he or she contracts. The Connecticut Department of Labor interprets that test as requiring that the individual performs such work for multiple customers. A Superior Court judge has now agreed with that interpretation, rejecting a claim by an appraisal firm that its appraisers were independent contractors because they had their own offices and equipment, were individually licensed, provided their own transportation and business cards, and used independent trade names. Since they were dependent on a single firm for their livelihood, they would likely be eligible for unemployment compensation if they lost that work, so the appraisal firm should be making payroll tax payments as their employer.

Yelmini Separation Settled: Last year we commented on the "layoff" of Linda Yelmini, who was then the head of the state's Office of Labor Relations, responsible for negotiations and arbitrations with the unions representing Executive Branch employees, and who was replaced by a political appointee. According to press reports, the legal dispute over her separation has been settled through mediation. Ms. Yelmini received a package worth about $325,000, and has been appointed as an alternate management member of the arbitration panel at the State Board of Mediation and Arbitration.

Save the Dates:

2016 Labor and Employment Public Sector Spring Seminar

March 17, 2016
8:00 AM - 12:30 PM
Sheraton Hartford South Hotel - Rocky Hill

Sexual Harassment Prevention Trainings

February 26, 2016
April 7, 2016
April 14, 2016
May 5, 2016
7:45 AM - 10:00 AM
Hartford Office

April 21, 2016
1:15 PM - 3:30 PM
Stamford Office

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