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Employment Law Letter

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Three Things You Didn't Know About Workers' Comp

Connecticut's system of workers compensation has been in place for over a century with few major changes, and yet it seems we keep coming up with unique circumstances that raise new questions. We'd be surprised if our readers could have guessed the correct answers to three new workers' comp questions addressed by the Connecticut Supreme Court in just the past couple of months.

First question: If an employee is killed in an on-the-job accident, can the spouse who discovers his body sue the employer for "bystander emotional distress?" That was the issue in a case brought by the wife of an employee of a Branford mosquito control company who was crushed under an ATV he was working on. Since she had already collected $300,000 in workers' comp survivor's benefits, the employer said the workers comp exclusivity principle should apply. The plaintiff countered that the benefits she received were compensation for her husband's death, not her own emotional distress.

The justices' answer was that, while they were sympathetic with the decedent's family, people who receive workers' compensation benefits give up their right to sue employers for damages, at least where there is a causal link between their alleged loss (in this case bystander emotional distress) and a compensable injury. Clearly her distress was the direct result of her husband's accident, so the answer to the first question was "no."

Second question: It is well established that a construction worker injured on a jobsite can't sue his employer, because he is entitled to workers' compensation benefits instead. But if he works for a subcontractor, can he sue the contractor who has general oversight of the project? After all, the general contractor (in this case O&G Industries of Torrington) usually only carries workers' comp insurance covering its own employees.

A divided Supreme Court struggled with this one, but ultimately decided that if the general contractor "bears the cost" of the workers compensation insurance covering its subcontractor's employees, it is entitled to immunity from suits filed by those employees. Since O&G had paid for that insurance in this case (thus allowing subcontractors to lower their bids for work on the project), the court said it was immune from suit, even though the cost of the insurance was ultimately included in the amount charged to the owner, like any other project cost.

This was the second courtroom setback for workers affected by the 2010 Kleen Energy gas explosion in Middletown. The first was

Labor & Employment Practice Group

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a lawsuit filed over lost wages by employees who were not injured in that explosion, but who were out of work as a result of it, as we reported earlier this year. However, O&G has settled other lawsuits stemming from the explosion for amounts totaling in the millions.

Third question: Can a workers comp insurance carrier that has paid out large sums to an injured employee sue a third party that the carrier claims is responsible for the injuries? That was the issue in a case brought by Pacific Insurance to recover amounts paid to an employee of a Connecticut welding company who suffered permanent injuries in a fall, allegedly because of the negligence of other contractors working on the project.

The trial court held that only the injured employee's employer could bring such a claim. However, the Supreme Court said the insurance company was the party that ultimately bore the cost of the workers comp benefits paid to the employee, so it was entitled to stand in the employer's shoes by invoking the principle of "equitable subrogation." The justices were careful to say they weren't deciding whether Pacific's lawsuit had merit, but only that the carrier was entitled to proceed with it.

Our question is how many of those did you get right? Most workers comp cases are fairly straightforward, but these three decisions show that there is always new and uncharted territory to explore.

Retaliation Claims Are Difficult to Defend

Let's say one of your employees applies for a promotion, and you choose someone else instead. The employee charges discrimination, but you convince the CHRO or another decision-maker that the applicant you selected was more qualified. Then the same employee applies for another position, and again you select a different applicant. The employee now claims this second rejection constitutes retaliation for the charge filed over the first.

While the first case can be dealt with successfully by simply presenting objective evidence of the superior qualifications of the successful applicant, the second involves a subjective element, i.e. what was your motivation for selecting a different applicant? If a question like this is submitted to a jury, the outcome can be difficult to predict, and very expensive. Just a few weeks ago a jury in New Haven awarded a Stratford police detective $2.5 million, mostly in punitive damages, because it didn't believe the Police Department's motives for adverse actions against the detective were legitimate.

The detective's problems started back in 2011, when the union president (then a Captain and now Police Chief) was accused of leaking information regarding the application of the then-mayor's brother for a position in the Police Department. He was given accelerated rehabilitation, but the detective told a fellow officer that the union president had made a "backroom deal" to save his job at the expense of other officers.

When that accusation was disclosed, the detective was issued a written warning, and was told that if he grieved it, the Police Department would initiate investigations of alleged misconduct on his part. He did file a grievance, and then the alleged retaliation began. He was removed from his position on the federal Drug Enforcement Administration, and an investigation was opened into his involvement in the theft of his DEA vehicle, even though he claimed he had nothing to do with it. He alleged he was forced to retire, and ultimately moved out of state.

Reportedly there was no clear proof of an improper motive presented at the trial, but the jury presumably believed the circumstances indicated there must have been a vendetta by the former union president and now Chief as a result of the detective's exercise of his free speech rights. They only deliberated for two and one-half hours before delivering their verdict. There's no word yet on whether an appeal will be filed.

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Our advice to employers is that, before taking some action that an employee is likely to consider materially adverse, someone should check on whether the employee has recently engaged in some protected activity that he or she might claim is the real reason for the adverse action. The definition of "recent" may depend on the circumstances, but reported cases include allegations of retaliation for protected activities up to a year or more in the past. If there is such a history, that doesn't necessarily mean the employer should reconsider its action, but only make doubly sure it can defend it on legitimate, objective grounds.

"Cat's Paw" Theory of Liability Expanded

It is well known that an employer can be held liable for discrimination or other employment-related offenses, even if it was unaware that a supervisor or other member of management had an improper motive for some action he or she took on behalf of the employer. That's why it can be risky, for example, to let a single individual be solely responsible for hiring or firing decisions. Lawyers refer to this as the "cat's paw" theory of liability, since the employer can get snared as a result of the supervisor's bad intentions.

But what if the person with an improper motive is not a supervisor but a co-worker, and management takes some adverse action in reliance on the co-worker's objectivity and good faith? The federal appeals court with jurisdiction over Connecticut addressed that issue in a lawsuit brought by a female ambulance worker who accused a male dispatcher of sexual harassment. The accused allegedly manipulated text and images on his cellphone to make it look like the woman was harassing him rather than the other way around. The ambulance company believed him, and allegedly did not even look at evidence that she offered to prove he was lying. As a result, they fired her instead of him.

When she filed a retaliation claim under Title VII, her employer argued the "cat's paw" theory only applied when the person with an improper motive was a supervisor. The appeals court disagreed. The judges said that an employer can be held liable for the results of the bad intentions of an employee at any level, at least "if the employer's own negligence gives effect to the employee's animus and causes the victim to suffer an adverse employment action."

Our advice to employers, which was spelled out in detail in a client alert we issued shortly after this case was decided, is to make sure that workplace investigations are thorough and objective. Sloppy mistakes like not interviewing all potential witnesses, not allowing some employees to present evidence that could undermine the claims of others, not exploring the motives of those whose statements are critical to the outcome of the investigation, and not taking steps to assure that witnesses are neither influenced nor intimidated by others, can lead to significant liability, even if the employer honestly believes it is doing the right thing.

Legal Briefs *and Footnotes*

UConn Pot Smoker Reinstated: This spring we reported on a UConn Health Center employee fired for smoking pot on the job. An arbitrator reinstated him, but a judge set aside that award, saying it was contrary to public policy. Now the Connecticut Supreme Court has agreed with

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COUNSELORS AT LAW

ALYCE ALFANO
ANDREANA BELLACH
GARY BROCHU
BRIAN CLEMOW*
LEANDER DOLPHIN
KEEGAN DRENOSKY
BRENDA ECKERT
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GARY STARR
CLARISSE THOMAS
CHRISTOPHER TRACEY
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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

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

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the arbitrator, saying discharge was not essential in order to uphold public policy. The justices felt that the arbitrator's remedy (a six-month unpaid suspension, last chance status, and random drug testing for a year) was enough.

Yale Students Seek Union: It didn't take the graduate student teaching assistants at Yale long to take advantage of the NLRB's recent ruling that student teaching and research assistants are employees who are entitled to unionize. Less than a week later, ten union election petitions were filed by UNITE HERE Local 33 seeking bargaining units in several of Yale's 56 academic departments. Yale is contesting this "mini-unit" approach, and a decision will be made by the NLRB Regional Director in Boston.

Can't Work? Not Qualified: A federal appeals court has ruled that a discharged Connecticut employee, who claimed his firing violated the ADA, Title VII and ADEA, could not argue that he was "otherwise qualified" to work, because he had told the Social Security Administration under oath that he was unable to work because of a variety of ailments. Therefore, the employee could not establish a case of discriminatory discharge. A Connecticut state court reached a similar conclusion in another case where a hospital employee was terminated due to chronic, frequent absences from a job that required regular direct contact with patients.

Volunteers Can't Claim Job Bias: The mother of an unpaid volunteer ambulance attendant filed a claim with the Connecticut Commission on Human Rights and Opportunities alleging that her daughter had been subjected to racist comments and was suspended and discharged based on discriminatory motivation. After a CHRO hearing officer granted a motion to strike the complaint, the mother appealed all the way to the Connecticut Supreme Court, which upheld the dismissal. The justices said that only employees could pursue such claims, and the fact that the daughter was subject to control by the ambulance company didn't make her an employee, since she wasn't paid.

CHRO Merit Assessment? LOL: Since 1994, the law has required the CHRO to conduct a "merit assessment review" to see whether a discrimination complaint has enough facial validity to justify going through a full investigation and all the other steps of the process. However, in the last 15 years, the CHRO has gone from over 40% dismissals to less than 2%. The result has been to force employers to offer some payment to settle cases, in order to avoid wasting money defending a case that has no merit. While the CHRO denies such a motive, statistics presented by CBIA to a legislative committee show the number of cases withdrawn as a result of a financial settlement has more than doubled in the last five years.

We *Thought* We'd Seen Everything: In our last issue, we reported on a Detroit firefighter who got someone to falsify an employment record so he got paid wages, including overtime, while he was in jail for three months. Now it appears Connecticut can top that. An Enfield corrections officer was called to active duty in the Army Reserve, which entitled him to continuation of a portion of his state wages. While on active duty he was convicted of sexual assault, and jailed for 17 months in Fort Leavenworth. However, he forged his orders so it appeared he was on active duty at the army base there, and as a result his state payments continued. Fortunately, after he returned to his DOC job, someone tipped off human resources about the scam.

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