Workplace Notes

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When Does Discrimination Start?

Under both Title VII and the Connecticut anti-discrimination law, an employee claiming to have been injured by a discriminatory employment practice must file a complaint with the state or federal agency. There is a time limit of 180 days for complaints to the Commission on Human Rights and Opportunities and a 300-day limit for complaints to the Equal Employment Opportunity Commission. But when do these time limits begin?

For the federal courts and many state courts, the discriminatory employment practice, and hence the time for filing a complaint, begins when the employee learns of a definite decision adverse to his employment, even if the decision is not implemented until a later date. The example is a college faculty member who is denied tenure. Typically, there is a final year of employment after the tenure decision is announced, but the time limits for a discrimination complaint begin to run from the announcement, not from the last day of employment a year later.

But now the Connecticut courts have departed from this principle. In the case of *Vollemans v. Town of Wallingford*, decided in August 2007, the Appellate Court held that Connecticut will not follow the majority rule but will instead start the filing period from the date that an adverse employment decision is implemented. Thus in Connecticut, an employee could be given six months' notice of termination, continue to work and be paid throughout the notice period and still have 180 days to file a complaint after employment has ended.

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Employment at Will Reaffirmed

Historically, union members had collective bargaining agreements and senior executives had written employment agreements, and everybody else was an employee at will, meaning that they had no contract rights in their employment. But ever since 1987, when the Connecticut Supreme Court in the case of *Finley v. Aetna Life and Casualty Co*, 202 Conn. 190, recognized the possibility of implied (that is, oral) employment contracts, many employees have claimed that their termination violated a contract right.

> "The court acknowledged that this result would intuitively seem unfair, but unfair is not necessarily illegal."

Take the plaintiff in the 1988 case of *Coelho v. Posi-Seal International, Inc*, 208 Conn. 106. He was recruited by the defendant company to take over their quality control department, but since he would have to quit his current job, he sought assurances that he would be supported, especially since he knew of the friction between quality control and manufacturing. The president guaranteed the support, and generally assured him that he would have a long and happy career, and so he did for a couple of years until he was fired because of friction with the manufacturing department. When he sued on a claim of breach of contract, the court agreed, holding that as a result of those conversations with the president, the plaintiff could never have concluded that he was an employee at will. Rather, he had an implied contract that he could not be fired without cause, or at least not because of inter-departmental friction.

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So what about a person who is recruited and offered employment, which he accepts and for which he quits his current job, only to be told by his new employer on reporting for his first day of work that they don't need him after all. Surely he wasn't just an employee at will either, but rather he must have had an implied contract to start the job and work until there was cause to fire him. Well, no, said the Connecticut Appellate Court last July in the case of *Petitte v. DSL.net, Inc*, 102 Conn App. 363. The difference was that the offer letter he received from the new employer told him he would be an employee at will, and spelled out what that meant – that he could be fired at any time, with or without cause.

The court said that the offer letter put the risk of termination on the employee. Under employment at will, he could be fired one second after he commenced employment, and therefore he could simply not be hired at all. The reservation of rights in the employer's offer letter negated any other legal claim, such as negligent misrepresentation or infliction of emotional distress.

The court acknowledged that this result would intuitively seem unfair, but unfair is not necessarily illegal. Under contract law, plainly expressed terms will be the "deal," even if that includes a clear disclaimer of any contractual promise, so in that sense the employer in the Petitte case - who was frank - was fairer than the employer in the *Coelho* case, who made empty promises.

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Can You Now Speak the Truth About Ex-Employees?

Old war movies often have a scene of soldiers being warned to give only their name, rank and serial number when questioned. Similarly, it is almost universally understood in human resources departments that inquiries about ex-employees from prospective employers are to be answered only with dates of employment, job titles and rates of pay.

The former employer never gives an assessment or recommendation as to the performance of the ex-employee, especially a negative one, for fear of a lawsuit by the ex-employee. This lack of communication is a disadvantage both to prospective employers and to ex-employees who are worthy of praise, and to the detriment of business as a whole.

Now the Connecticut Supreme Court has attempted to restore some sanity to the process. In the recent case of *Miron v. University of New Haven Police Department*, released on September 25, 2007, the Court held that if the ex-employee has signed a release authorizing his former employer to respond to a request for information about him, the former employer has a "qualified privilege" for any comments it may make. A qualified privilege means that the former employer cannot be sued for defamation (or related claims like tortuous interference with business expectancies or infliction of emotional distress) unless the ex-employee can prove that the comments were made with actual malice. In other words, any comment made in good faith is protected, even if it could be shown to be inaccurate. Former employers risk liability only if they deliberately make false statements for the purposes of harming the ex-employee.

In *Miron*, the plaintiff applied for other police department positions, and those police departments naturally solicited comments from her former employer, the University of New Haven Police Department, as to her qualifications in law enforcement. She was turned down for one job and hired for another but flunked out of training. She then sued her former employer, claiming that it was their comments rather than her performance which cost her the new positions.

Although Connecticut has a general statute, Section 31-128f, which prohibits the release of information from a personnel file, the Court held that comments and opinions by former employers are outside of personnel records. Moreover, the ex-employee had given a written release. The Court stated that the integrity of employment references not only is essential to prospective employers, but also to prospective employees, who stand to benefit from the credibility of positive recommendations. It would encourage a "culture of silence" not to afford a qualified privilege to employment references that are made in good faith and without proper motive.

Last year, the Connecticut Appellate Court decided the case of *Chadha v. Charlotte Hungerford Hospital*, in which a

doctor sued the Hospital over assessments of his fitness to practice medicine that were submitted to the National Practitioner Data Bank and the Connecticut Department of Public Health. But the Court ruled that the doctor could not assert a claim unless he proved actual malice based on improper motive.

In the *Miron* case, the comments were from one police department to another; in the *Chadha* case, the comments were from a hospital to regulators of physicians. All employers think that an informed evaluation of applicants is important but it is especially important for employers who are also protecting society as a whole. Because these plaintiffs were bold enough to challenge comments on their fitness to be police officers or to practice as physicians, without any proof that the comments were made in bad faith, all employers now benefit from a qualified privilege to respond to inquiries about ex-employees, and to make inquiries about applicants in their turn.

However, although the Court did not make it a prerequisite, employers should always require that the inquiring prospective employer furnish a signed release from the ex-employee.

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Should Private Sector Employers Worry About Unionization Any More?

In more than 20 years of steady decline in private sector unionization, private employers outside of construction, health care and a few other heavily unionized industries, have grown complacent. Recently, however, private sector unions have developed new strategies that deserve attention.

Traditionally, a union would collect 30 percent or more of the employees' signatures, petition the federal labor board (NLRB) and start a campaign leading to a secret ballot election. In this recognizable window of opportunity, the employer could educate its employees about the limitations of union power and the impact a union victory could have on the health of the business and the security of their paychecks. Now though, there is increasing truncation of the process at the employee signature collection stage. Proposed federal legislation would require an employer shown sufficient authorization cards signed by its workers to recognize and bargain with the union, without a secret ballot election.

Even without this new legislation, unions have found ways to avoid secret ballot elections. Neutrality pledges – in which an employer promises not to oppose any union organizing efforts – are now common clauses in contracts covering some portion of a company's workforce and a popular condition of doing business with local governments.

If there is no campaign, how can an employer opposed to unionization get its message across to its employees? The answer is: early and often. There has never been a ban on employers truthfully telling their workers that they think union representation is a bad idea and why. You do need to avoid the illegal "P.I.T.S." (promises, interrogation, threats and surveillance), but careful planning and training can equip your managers and supervisors to carry out this mission lawfully and effectively as part of ongoing communications with your workforce.

Speaking of supervisors, the NLRB issued a group of decisions this year defining how to distinguish between employees (who can be represented by unions in the private sector) and supervisors (who cannot) in the meaning of the federal labor statute. The press coverage focused on the cases' impact on nurses, but the guidance applies equally to lead persons, crew chiefs, project bosses and any staff in charge of work performed by others to some degree. Employers should review and adjust the way these jobs are structured to assure that those they think of as part of the management team in labor relations matters don't end up on the other side of the table.

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