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Agency Tries To Dodge Restrictions On Awards

CHRO wants to offer emotional distress compensation in discrimination cases

By MICHAEL N. LaVELLE

Prior to the decision of the Connecticut Supreme Court in *Bridgeport Hospital v. CHRO*, 232 Conn. 91 (1995), the Commission on Human Rights and Opportunities claimed to have statutory authority to award general compensatory damages for emotional distress (and also attorneys' fees) pursuant to Connecticut General Statutes 46a-86(a).

But in *Bridgeport Hospital* and the companion case of *Fenn Manufacturing Company v. CHRO,* 91 Conn. 117 (1995), the Court held that deference to the CHRO in this instance was improper, and that C.G.S. 46a-86(a) did not allow emotional distress damages.

The CHRO then theorized that employment discrimination claims are made pursuant to both C.G.S. 46a-60 and C.G.S. 46a-58(a), that "whether a violation of employment laws is also a violation of 46a-58(a)" was expressly left undecided in *Bridgeport Hospital,* and since the damages allowed pursuant to C.G.S. 46a-86(c) for a discriminatory practice prohibited by 46a-58 include general damages and attorneys' fees, emotional distress damages could be awarded in employment claims after all. However, the Supreme Court also rejected this theory, holding that "46a-58(a) does not apply to discriminatory employment practices encompassed by §46a-60." *CHRO v. Truelove and MacLean Inc.,* 238 Conn. 337, 346 (1996). The Court reasoned that 46a-86(b) expressly applies to a "discriminatory employment practice," which is something other than a discriminatory practice "prohibited by §46a-58(a)."

Undaunted, the CHRO next proposed that the Supreme Court really meant that emotional distress damages are not available for a 46a-58(a) claim *arising from 46a-60*. But if the 46a-58(a) claim is viewed as *arising from federal law*, then it becomes a separate statutory claim, to which damages under 46a-86(c) would apply. See *CHRO Ex rel John Crebese v. Proctor and Gamble Pharmaceuticals Inc.,* CHRO No. 0330171 (2006). In other words, either 46a-60 or 46a-58(a) may be invoked as long as there is a federal anti-discrimination law to support the 46a-58(a) claim. This theory largely vitiates the holding of the Supreme Court in *Truelove and MacLean* since almost all discriminatory employment practices described in the Connecticut statute have a counterpart in federal law.

For this argument, the CHRO relied on a phrase in *Trimachi v. Connecticut Workers' Compensation Committee*, 2000 WL 872451 (Conn. Super) to the effect that 46a-58(a) has expressly converted a violation of federal anti-discrimination laws into a violation of Connecticut anti-discrimination laws. *Trimachi*, however, was deciding whether disability discrimination under 46a-60 should include an obligation of reasonable accommodation [prior to *Curry v. Allan S. Goodman Inc.,* 266 Conn. 390 (2008)], not whether invoking 46a-58(a) and a federal statute opened the door to damages pursuant to 46a-86(c). *Trimachi* was not attempting to distinguish the Supreme Court's holding in *Truelove and Maclean* that 46a-58(a) does not apply to discriminatory employment practices encompassed by 46a-60.

The CHRO has persisted in this theory in the face of the seemingly conclusive holding in *CHRO v. Cheshire Board of Education*, 270 Conn. 665 (2004). In that case, the issue was whether the CHRO had jurisdiction over a student's claim of racial discrimination, or whether the education statutes (C.G.S. §§10-4b and 10-15c) vested exclusive jurisdiction in the state board of education. The Supreme Court held that racial discrimination against a student was a discriminatory practice prohibited by a state law, and so came under 46a-58(a) (seemingly an example of a discriminatory practice that was not a discriminatory employment practice). The Court distinguished the holding in *Truelove and MacLean* as a determination that the "narrowly tailored" provisions of §46a-60 supersede the "general cause of action embodied in §46a-58(a)." 270 Conn. at 722-723.

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Available Remedies

The CHRO's latest theory fails to distinguish between jurisdiction over a cause of action under 46a-58(a) and the set of remedies available on a claim of discriminatory employment practice. Even if a specific claim of employment discrimination that is included in (*i.e.*, encompassed by) 46a-60 is also covered by the general terms of 46a-58

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with reference to a federal law, the question remains which set of remedies the CHRO can employ.

The answer seems to be that 46a-60 and 46a-58(a) are not on parallel tracks as far as remedies are concerned, but rather 46a-60 trumps the more general statute. The only remedies available on a claim of employment discrimination are the remedies allotted to 46a-60 by 46a-86(b), which do not include general damages or attorneys' fees.

It is a basic principle of law that in enacting a statute, the legislature is presumed to have acted with knowledge of existing statutes and an intent to create one consistent body of law. A statute should not be interpreted in any way to thwart its purpose and lead to absurd or bizarre results. *State v. Hall,* 82 Conn. App. 432 (2004). In the array of discriminatory employment practices listed in §46a-60, the only categories that are not also covered by a federal law are marital status and (perhaps) learning disability. Under the CHRO's theory, claimants in these two categories are shortchanged as to remedy; because they cannot invoke a federal law to support jurisdiction under 46a-58, they cannot seek emotional distress damages or attorneys' fees.

Moreover, the CHRO's theory leads to the conclusion that the legislature also shortchanged violations of sexual orientation discrimination, for which there is also no analogous federal law. Sexual orientation discrimination was made a discriminatory employment practice, not by being added to 46a-60, but pursuant to C.G.S. 46a-81c. Whereas the broader array of damages under 46a-86(c) is specifically available for sexual orientation discrimination in public accommodation pursuant to C.G.S. 46a-81d and housing pursuant to C.G.S. 46a-81e, a violation of 46a-81c is a discriminatory employment practice, with damages available under 46a-86(b).

Thus, the CHRO's theory posits that the legislature allowed for compensation for emotional distress and attorneys' fees for federally-recognized categories of employment discrimination, but not for claimants of discrimination on account of marital status, sexual orientation, and possibly learning disability. Yet there is nothing about these categories that justifies a lesser range of remedies.

Rather, the holding in *John Crebese* that violations of the federal law are within the purview of 46a-58(a), does not lead to the conclusion that emotional distress damages and attorneys' fees may be awarded for such violations. They may be within the purview of the general statute, but that does not make the remedies of §46a-86(c) applicable to employment discrimination, as an end-run around the holdings of *Truelove and MacLean* and *Cheshire Board of Education*.

Thus, a complainant does not have a choice of designating her claim as *arising* under 46a-58(a) *plus* a federal law, and so obtaining a broader array of damages. Likewise, a victim of a discriminatory employment practice without a federal counterpart is not a second-class claimant with a lesser limited remedy. The Supreme Court has held that the legislature chose to encompass, i.e., include, *all* employment discrimination claims in a specific, narrowly tailored cause of action embodied in 46a-60 (and in 46a-81cc for sexual orientation), and also provide the exclusive remedy for employment discrimination claims in 46a-86(b). That remedy does not include attorneys' fees or emotional distress damages. ■