Connecticut General Statutes § 31-51q at 40:

Emerging Questions for Connecticut's Employee Free Speech Statute

BY ZACHARY D. SCHURIN

THE NEWYEAR, 2023, MARKS THE 40TH anniversary of the initial passage of Connecticut General Statutes § 31-51q. Connecticut's employee free speech protection statute, Section 31-51q, broadly protects both public and private-sector Connecticut employees from retaliation in employment for speech that is protected under either the federal or Connecticut Constitution. While public-sector employees across the country enjoy at least some measure of free-speech protection in employment by virtue of the First Amendment's application to public employment via 42 U.S.C. § 1983 actions, Connecticut is almost entirely unique in the broad free speech protections it affords to both public *and private-sector employees* pursuant to Section 31-51q.[1]

Even as it celebrates its 40th anniversary, fundamental questions regarding Section 31-51q still arise. In particular, the scope of Connecticut constitutional protection afforded to employees for speech made pursuant to official duties as well as the threshold question of what constitutes "discipline" for purposes of the law, have been the subject of numerous trial court decisions in recent years. The ultimate resolution of these questions as well as new questions stemming from recent amendments to Section 31-51q could have a profound impact on the law regarding workplace protected speech in Connecticut for years to come.

What Counts as Speech Addressing "Official Dishonesty, Deliberately Unconstitutional Action, Other Serious Wrongdoing, or Threats to Health and Safety"?

Not all speech is protected. As Justice Oliver Wendell Holmes once observed, even the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[2] There are limits to constitutional protections for speech and there are particular limits to speech protections in the workplace. As Justice Holmes once also observed "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3] This is especially true when the speech at issue falls within the scope of an employee's job duties.

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), a divided United States Supreme Court held that speech made pursuant to a public employee's official duties is not "citizen" speech protected under the First Amendment. The court's holding in *Garcetti* built upon the Supreme Court's prior holdings in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 142 (1983), which resulted in the so-called "*Pickering/Connick* balancing test" for assessing First Amendment retaliation claims made by public-sector employees.[4]

The *Pickering/Connick* balancing test requires the consideration of whether an employee's speech addresses a matter of public concern and if so whether the employee's interest in speaking on the matter outweighs the employer's interest in promoting the efficient performance of public services through regulation of the speech. As a result of the Supreme Court's holding in *Garcetti* however, the *Pickering/Connick* balancing test is only reached if a reviewing court first finds that the employee's speech *was not made* pursuant to his or her official duties as an employee.[4]

While *Garcetti*'s holding was incorporated into Section 31-51q claims premised on First Amendment violations of the federal constitution,[5] for a number of years *Garcetti*'s application to claims premised on violations of the Connecticut Constitution was unclear. That changed in 2015 with the Connecticut Supreme Court's ruling in *Trusz v. UBS Realty Inv'rs, LLC*, 319 Conn. 175 (2015).

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In *Trusz*, the Court rejected *Garcetti*'s bright line official duties exclusion for Section 31-51q claims based on violations of the state constitution and instead adopted a modified form of the *Pickering/Connick* balancing test that provides constitutional protection to speech made pursuant to an employee's duties, but only if the speech addresses "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."[6] As such, under the *Trusz* standard an employee may still have a viable Section 31-51q claim if he or she reports or speaks out about troubling behavior in the workplace even if the speech was made pursuant to the employee's job duties. According to the *Trusz* Court, this approach to employee free speech retaliation claims, which was first advocated by former Justice David Souter in a dissenting opinion in *Garcetti*,[7] best reflects the broad speech protections set forth in the Connecticut Constitution.

Since *Trusz*, Connecticut employment law attorneys and trial court judges have wrestled with the question of what exactly constitutes speech on "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." A survey of trial court decisions since *Trusz* was handed down suggests a few common themes.

Employee speech touching on potential health and safety issues has generally—but not always—satisfied the first of the *Trusz*'s exceptions to *Garcetti*. For instance, reports from a subordinate regarding a supervisor ordering and storing guns in an unsecured desk at work,[8] complaints about the quality of high-performance electrical wire and cable used for military and aerospace applications,[9] complaints regarding the unlicensed installation of water heaters by the employee of a property management company,[10] manipulation and fabrication of data by a clinical research and drug development company,[11] complaints regarding a co-worker who had been involved in multiple motor vehicle accidents,[12] concerns about incomplete and inaccurate information provided to the Connecticut Department of Health in connection with an investigation,[13] and requests to buy a replacement steering link on a tractor trailer truck[14] have all been found to satisfy *Trusz*'s health and safety exception for speech made pursuant to official employee duties.

On the other hand, particularly in the healthcare field, a number of courts have rejected health and safety claims where the speech at issue involved concerns over an isolated incident rather than a systemic issue. In these cases, since the employee's speech was specific in nature to a particular patient or safety issue, the speech was not found to address a matter of public concern and therefore lacked constitutional protection before the question of whether the *Trusz* health and safety exception was reached.[15]

With respect to the "official dishonesty" and "serious wrongdoing" *Trusz* exceptions, the case law has been more mixed. Employee complaints regarding improper contracting procedures and the misuse of public funds, [16] perceived corruption in state government[17] as well as concerns about inaccurate and incomplete disclosures to state regulatory bodies[18] have all been deemed to constitute speech regarding official dishonesty and/or serious wrongdoing entitled to state constitutional speech protection per *Trusz*.

However, somewhat inexplicably, in other cases speech on similar topics has been found not to satisfy either the official dishonesty or serious wrongdoing exceptions. For example, Section 31-51q cases involving alleged complaints of pay inequity between employees that did not include claimed violations of state or federal law,[19] the reporting by a school employee of a student's violation of a school transportation policy[20] and concerns regarding internal review boards, intern assignments and insurance and workers compensation policies at a public university[21] were all deemed not to fall within either the "official dishonesty" and "serious wrongdoing" *Trusz* exceptions.

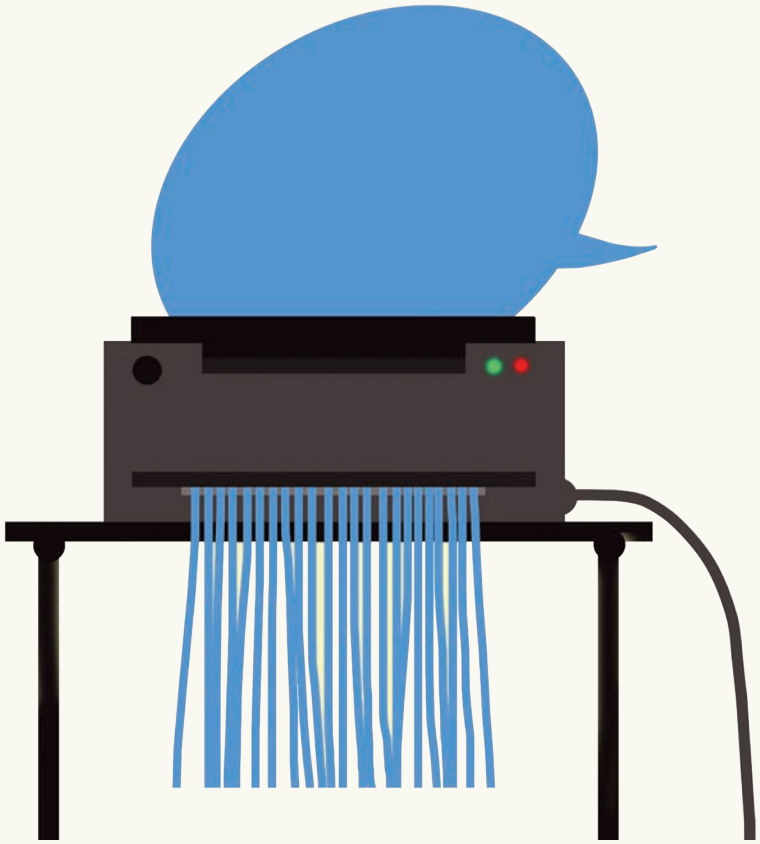
While the Court in *Trusz* concluded that the flexibility of the *Pickering/Connick* balancing test was preferable to *Garcetti*'s categorical exclusion of constitutional protection for speech made pursuant to official duties,[22] as the cases noted above highlight, clearly defining the nature of the *Trusz* exceptions has proved elusive. Whether or not Connecticut's appellate courts can draw any bright line rules in future cases clarifying the *Trusz* exceptions to *Garcetti* remains to be seen, but without additional guidance it seems that questions regarding the meaning of speech addressing "health and safety" or "serious misconduct" will persist for years to come.

What is Employee "Discipline" for Purposes of Section 31-51q?

Beyond the issue of what speech warrants constitutional protection lies an even more basic question for Section 31-51q purposes—what counts as an act of employer retaliation per Section 31-51q?

By its terms, Section 31-51q imposes liability on "any employer … who subjects or threatens to subject any employee to discipline or discharge on account of [constitutionally protected speech]." While an employee "discharge" from employment is usually straightforward enough, the question of what constitutes employee "discipline" can be surprisingly complex. An unpaid suspension or formal written reprimand would seem to clearly constitute discipline, but what about other "lesser" employer actions? Is a negative performance review "discipline"? A less desirable work assignment? A denied promotion? How about a denied request to attend an out-of-state work conference?

A number of Connecticut decisions have addressed the "discipline" question in detail, but there are three Superior Court decisions that deserve particular attention. The first and most prominently cited is Judge Jon C. Blue's 2000 decision in *Bombalicki v. Pastore*.[23] In that case, which involved a New Haven police officer's claim that he was denied promotion to the rank of lieutenant for the exercise of his free speech rights, Judge Blue



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exhaustively examined dictionary definitions of the word "discipline." Section 31-51q's legislative history and analogous Connecticut statutes that use the phrase "discipline or discharge" to conclude that "discipline" for purposes of Section 31-51q is "an affirmative act of deprivation that diminishes the status or happiness of the recipient rather than a failure to enhance that status or happiness."[24] On the basis of this construction, particularly "the affirmative act of deprivation" component of the definition, Judge Blue determined that a denied promotion could not qualify as "discipline" for purposes of Section 31-51q.[25]

More recently, in 2017, then-Judge, now-Justice, Steven D. Ecker reached a very different conclusion in *Browne v. State Dep't of Correction*.[26] There the plaintiff alleged that the Department of Corrections disciplined him by transferring him to a less desirable assignment with different job duties while a misconduct investigation was pending against him.[27] According to the plaintiff, this reassignment adversely affected his promotional opportunities and caused the revocation of previously approved vacation time.[28]

After finding that the plaintiff's alleged retraction of vacation days constituted an "affirmative deprivation" sufficient to meet the *Bombalicki* standard, the *Browne* court in *dicta* nonetheless expressed serious reservations about the notion that "discipline" for purposes of Section 31-51q could not include the withholding of a prospective employment benefit—such as a potential promotion—along with an affirmative act of deprivation such as a suspension or formal reprimand.[29] In arriving at this conclusion, the *Browne* court looked favorably to the far more-flexible (and employee friendly) standard used in 42 U.S.C. § 1983 First Amendment retaliation cases—namely whether the alleged employer retaliatory conduct "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights."[30] According to the court in *Browne*, in most cases, the Section 31-51q "discipline" determination must be a highly fact-specific inquiry that is not usually susceptible to resolution on summary judgment.[31] As now-Justice Ecker explained:

> In light of the statute's purpose to safeguard fundamental constitutional rights, an employer should not be allowed to penalize an employee's exercise of those rights by inflicting pain without leaving marks. An administrative transfer can be sensible and necessary, or it can be cynical and punitive. The adverse effects can be significant or *de minimis*. Whether the job action is disciplinary cannot be decided based solely on what the employer calls it.[32]

As a result, according to the *Browne* court "discipline" pursuant to Section 31-51q must be defined to include "any adverse material consequence imposed by an employer on an employee for the purpose of punishing or deterring behavior that the authority wishes to suppress."[33]

A final Superior Court opinion worthy of particular attention on the "discipline" question—and perhaps the most persuasive—is Judge Cesar A. Noble's 2018 decision in *Weinstein v. Univ. of Connecticut*.[34] In that case, a former administrator and assistant professor in residence who claimed that he had been hired with the promise of continued employment as long as program funding was available and his performance was satisfactory, alleged that he was denied reappointment to both positions after expressing concerns to a superior that program changes may violate state and federal employment laws and internal university rules.[35]

After examining the *Bombalicki* and *Browne* decisions in depth, the *Weinstein* court settled on something of a middle ground. According to *Weinstein*, "discipline" for purposes of Section 31-51q "refers to any adverse material consequence relative to a right, term, condition or benefit of employment that existed at the time of the protected speech."[36]

While more permissive than the "affirmative act of deprivation" standard set out in *Bombalicki*, but less fact-specific then the general adverse material consequence standard advocated for in *Browne*, Judge Noble's definition of "discipline" in *Weinstein* explicitly recognized that the "discipline or discharge" text of Section 31-51q is more limited than the operative text of comparable federal and state statutes.[37] As an example, the court in *Weinstein* cited to Connecticut General Statutes § 31-51m which provides that an employer shall not "discharge, discipline *or otherwise penalize*" an employee for engaging in certain whistleblowing activities and notes that "[h]ad the legislature intended a more expansive level of conduct as the trigger for § 31–51q liability, it knew how to write such a statute."[38]

On the basis of its definition, *Weinstein* found that the plaintiff's denied reappointment was sufficient to state a claim of "discipline" under Section 31-51q—a result that likely would not have been reached under *Bombalicki*'s "affirmative act of deprivation" standard.[39]

As *Bombalicki*, *Browne*, and *Weinstein* illustrate the meaning of "discipline" for Section 31-51q purposes is certainly up for debate. If and when Connecticut's appellate courts address the issue it could have a profound impact on employee free speech law in Connecticut since many claims are based on employer conduct short of termination.

The Meaning of "Threatened" Discipline

If the above issues were not enough to keep Connecticut employment lawyers on their toes, last year the General Assembly threw proverbial gasoline on the fire with a series of amendments to the text of Section 31-51q—the first such amendments in the law's 40-year history. While a new provision in the statute prohibiting employers from disciplining or discharging employees for their refusal to attend so-called "captive audience" anti-unionization meetings is already the subject of litigation,[40] another change to Section 31-51q has garnered less attention but also could have a very significant impact.

Specifically, Public Act 22-24, entitled *An Act Protecting Employee Speech and Conscience*, amended the basic text of Section 31-51q to impose liability on any employer "who subjects or threatens to subject any employee to discipline or discharge on account of [the exercise of constitutionally protected speech] …."

What exactly is the "threat" of discipline when it comes to employee speech? Does a manager need to say "or else" in order for a threat to be made? If an employee makes an arguably offensive post on social media one night and his supervisor approaches him the next day at work and says, "We saw the post you made on Facebook last night and we would really appreciate it if you take the post down," has the employee been threatened? In some workplaces a meeting with the boss is presumably an implicit "threat" in and of itself.

Moreover, Public Act 22-24's inclusion of threatening conduct within the scope of the statute arguably opens (or expands) the door to employer liability not just in retaliation for employee speech that has already been made, but also to *prospective speech that an employee has yet to make* since a threat is typically made to deter future conduct. This is potentially a hugely significant change in the law. Could a poorly-worded employee handbook provision or employee speech policy be deemed a "threat" of discipline for constitutionally protected speech that an employee has yet to make?

As the discussion of the "discipline" issue above should make clear, this change will almost certainly result in some very difficult line drawing issues for Connecticut courts.

Conclusion

In many ways, at 40 years old Section 31-51q is just beginning to hit its stride. As we advance into the social media age and in an era of intense political polarization, it stands to reason that employee speech issues will play an even more prominent role in the workplace. As disputes arise, Connecticut judges and lawyers will continue to wrestle with new and old questions posed by Section 31-51q. ■

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NOTES

1. *See generally*, Chloe L. Kaufman, Speaking About Politics, A Fireable Offense? The Legality of Employee Speech Restrictions in the Entertainment Industry, 8 NYU J. Intell. Prop. & Ent. L. 376, 399 (2019); Eugene Volokh, Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation, 16 Tex. Rev. L. & Pol. 295 (2012). While a number of other states have statutory provisions restricting employers from retaliatory activity against employees for engaging in certain political activities, as of 2012, Connecticut was the only state that broadly protected employees in the exercise of constitutionally protected free speech rights. Volokh, supra at 310-311.
2. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
3. *McAuliffe v. City of New Bedford*, 29 N.E. 517 (Mass. 1892).
4. *Garcetti*, 547 U.S. at 421.
5. *See, Schumann v. Dianon Systems, Inc.*, 304 Conn. 585, 610 (2012).
6. *Trusz*, 319 Conn. at 216-217.
7. *Garcetti*, 547 U.S. at 427-444.
8. *Schulz v. Auto World, Inc.*, No. HHDCV156060382, 2016 WL 7135040, at *8 (Conn. Super. Ct. Oct. 25, 2016).
9. *Neal v. Specialty Cable Corp.*, No. 3:21CV00497(SALM), 2022 WL 4584082, at *7–8 (D. Conn. Sept. 29, 2022).
10. *Violette v. Catalyst Sols.*, LLC, No. 18-CV-1875 (KAD), 2019 WL 2517060, at *5 (D. Conn. June 18, 2019).
11. *Bacewicz v. Molecular Neuroimaging*, LLC, No. 3:17-CV-85 (MPS), 2019 WL 4600227, at *10 (D. Conn. Sept. 23, 2019).
12. *Gills v. City of New London*, No. KNLCV206047731S, 2021 WL 5112985, at *5 (Conn. Super. Ct. Oct. 15, 2021).
13. *Cobb v. Atria Senior Living, Inc.*, No. 3:17-CV-00291 (MPS), 2018 WL 587315, at *9 (D. Conn. Jan. 29, 2018).
14. *Roach v. Transwaste, Inc.*, No. HHDCV176074305S, 2020 WL 588934, at *3 (Conn. Super. Ct. Jan. 3, 2020).
15. *See, Weicholz v. Dept. of Mental Health & Addiction Services*, No. CV-21-6111109-S, 2022 WL 2678893, at *3 (Conn. Super. Ct. July 11, 2022) (employee's concerns with single patient's medical records – particularly with respect to medications or prior medical instructions being ignored – not deemed to address matter of public concern); Qamar v. Sheridan Healthcare of Connecticut, P.C., No. 3:18CV1359 (JBA), 2020 WL 4548136, at *14, (D. Conn. Aug. 6, 2020) appeal dismissed (Jan. 14, 2021); Beamon v. Yale New Haven Hosp. Inc., No. 3:16CV181 (JBA), 2017 WL 969266, at *5 (D. Conn. Mar. 13, 2017); reconsideration denied, No. 3:16CV181 (JBA), 2017 WL 1383438 (D. Conn. Apr. 11, 2017).
16. *Blue v. City of New Haven*, No. 3:16-CV-1411 (MPS), 2019 WL 399904, at *9 (D. Conn. Jan. 31, 2019).
17. *Brown v. Office of State Comptroller*, 456 F. Supp. 3d 370, 410–11 (D. Conn. 2020).

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comments you may have, including suggestions on how "[t]ogether we can identify and implement effective ways to fight hate crimes in Connecticut and lead the way to a safe and more inclusive United States of America."[4] ■

***Amy Lin Meyerson**, the 2020–2021 president of the Connecticut Bar Association, and **Judge Douglas Lavine**, Trial Judge Referee, are the co-chairs of the Connecticut Hate Crimes Advisory Council.*

NOTES

1. 2022 Annual Report, The Connecticut Hate Crimes Advisory Council, https://portal.ct.gov/hatecrimes/-/media/CT-Hate-Crimes-Advisory-Council-Annual-Report-FINAL-93022.pdf at 3.
2. Written Testimony of Amy Lin Meyerson, Esq. as Co-Chair of the Connecticut Hate Crimes Advisory Council In Support of Raised Bill SB217, March 3, 2022.
3. HCAC Annual Report at 4.
4. HCAC Annual Report at 39.

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18. *Cobb*, 2018 WL 587315, at *9.
19. *Palmer v. Brook & Whittle Ltd.*, No. NNHCV146049093, 2017 WL 1239646, at *3 (Conn. Super. Ct. Mar. 2, 2017).
20. *D'Amato v. New Haven Bd. of Educ.*, No. CV1960910325, 2020 WL 1656202, at *9 (Conn. Super. Ct. Mar. 2, 2020).
21. *Weinstein v. Univ. of Connecticut*, No. HHDCV1160271125, 2021 WL 2446339, at *15 (Conn. Super. Ct. May 18, 2021).
22. *Trusz*, 319 Conn. at 202.
23. No. 378772, 2000 WL 726839 (Conn. Super. Ct. May 10, 2000); aff'd on other grounds 71 Conn. App. 835 (2002).
24. *Id.* at *3.
25. *Id.* at *5.
26. No. NNHCV176067843, 2017 WL 5243854 (Conn. Super. Ct. Oct. 10, 2017).
27. *Id.* at *2.
28. *Id.*
29. *Id.* at *3-4.
30. *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006), cert. denied, 549 U.S. 1342 (2007)
31. *Browne*, 2017 WL 5243854, at *3-4, note 8.
32. *Browne*, 2017 WL 5243854, at *4.
33. *Browne*, 2017 WL 5243854, at * 3.
34. No. HHDCV1160271125, 2018 WL 2222131 (Conn. Super. Ct. Apr. 25, 2018).
35. *Weinstein*, 2018 WL 2222131 at *1-2.
36. *Id.* at *6.
37. *Id.*
38. *Id.* at *7.
39. *Id.*
40. As of this writing, the case, which is captioned *Chamber of Commerce, et al. v. Bartolomeo et al.*, No. 3:22-cv-01373, is currently pending in federal District Court for the District of Connecticut. With their lawsuit the U.S. Chamber of Commerce, the Connecticut Business and Industry Association ("CBIA") and other plaintiffs allege that Public Act 22-24's amendments to Section 31-51q violate the First and Fourteenth rights of Connecticut employers and that the provisions relating to captive audience meetings are preempted by the National Labor Relations Act. The case raises a whole set of critical Section 31-51q questions that are beyond the scope of this article.

Book Review

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stable mental health and became more involved in politics after 1854.

3. *See*, for example, John Ford's treatment of Ann Rutledge in his award-winning movie "Young Mr. Lincoln."
4. Donald's title reverses that of Herndon's own biography of Lincoln, *Herndon's Lincoln*.
5. Slaughter, Thomas P., "Towering Termagant," *Reviews in American History*, Vol. 49, No. 3 (2021), pp. 429-434.
6. *Id.* Revisionist history is seen in John Y. Simon, "Abraham Lincoln and Ann Rutledge," Journal of the Abraham Lincoln Association, Vol. 11, No. 1 (1990).
7. *See* Burlingame, *supra*, note 1.

Wellness

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NOTES

1. The men's first place finisher in 2021 finished the race in 21 minutes and 23 seconds, running on average each mile in 4 minutes and 30 seconds. https://results.raceroster.com/en-US/results/detail/32cj3jgw5n9g-p6x9
2. My 2018 full course marathon time was 3 hours and 53 minutes. A mere 1 hour and 35 minutes behind the race winner (who completed the race in 2 hours and 18 minutes).

3. www.webmd.com/fitness-exercise/how-running-affects-mental-health

President's Message

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We are hoping to raise funds that would benefit our Special Olympics Connecticut athletes by having a friendly competition between our section and committee members. Keep an eye out for more details as the new year unfolds. We can work together in 2023 just like a World Cup soccer team to achieve our GOOOOOOOAAAAAAAAALL! (I couldn't resist!) . ■

NOTES

1. Legendary soccer star Pelé passed away on December 29, 2022, at the age of 82.