
Week of March 30

Welcome to our Supreme and Appellate Court summaries webpage. On this page, I provide abbreviated summaries of decisions from the Connecticut appellate courts which highlight important issues and developments in Connecticut law, and provide practical practice pointers to litigants. I have been summarizing these court decisions internally for our firm for more than 10 years, and providing relevant highlights to my municipal and insurance practice clients for almost as long. It was suggested that a wider audience might appreciate brief summaries of recent rulings that condense often long and confusing decisions down to their basic elements. These summaries are limited to the civil litigation decisions. I may from time to time add commentary, and may even criticize a decision's reasoning. Such commentary is solely my own personal opinion.. Pullman & Comley's Appellate Practice Group of which I am a member includes experienced appellate advocates in almost every area of the law. Should you have a need to consult about a potential appeal, please email me at emccreery@pullcom.com I hope the reader finds these summaries helpful. – Edward P. McCreery

Posted March 31, 2015

- AC34886 - [State v. Bush](#)
- AC35418 - [State v. LaFleur](#)
- AC36275 - [North Star Contracting Corp. v. Albright](#)

This case dealt with who is the proper party to bring a shareholder derivative action. A principal of a company already suing a target company formed another entity to buy shares of stock in the target company. That principal then had his new entity bring a shareholder derivative action under §§ 33-720 – 727 against the board of directors of the target company, alleging they had breached their fiduciary duties by refusing to investigate the claims of the principal's first company.

The defendants responded with a motion to dismiss for lack of standing, claiming that the plaintiff was not a shareholder at the time of the alleged misconduct, and it could not fairly and adequately represent the corporation's interest when there was a direct action pending against the company for the same misconduct by a related entity. C.G.S. § 52-572(j) provides that a derivative action may not be maintained if the plaintiff does not fairly and adequately represent the interests of the shareholders. This is also found in § 33-721(2). The court said this is a fact-intensive, equitable test, with no less than eight components. Applying these tests, most courts would agree that it was an irreconcilable conflict of interest where an individual in a plaintiff stockholder's derivative action is seeking recovery on behalf of the corporation, when they are also a

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party to a suit attacking the corporation and seeking to recover from it. It cannot be overlooked here that we have that same basic fact pattern when the same principal controls both entities. It is especially true when the underlying circumstances of both lawsuits are the same. The Motion to Dismiss was properly granted.

- AC36175 - [Ruiz v. Commissioner of Correction](#)
- AC35682 - [Madigan v. Housing Authority](#)
- AC35682 [Concurrence - Madigan v. Housing Authority](#)

Plaintiff was the former executive director of the Housing Authority, and had a written employment agreement for a five-year period, and could only be removed for **just cause** before the expiration of the contract. The defendant's Board grew concerned that the plaintiff was not appropriately dealing with morale issues, and was not appropriately handling a newly-hired manager. Then rumors started to circulate that the plaintiff was having an affair with the newly-hired manager. The Board imitated an inquiry and polled the staff, who generally voiced dissatisfaction with the plaintiff's performance but they found no evidence of an improper affair. When the plaintiff was confronted by the Board, he grew angry and raised his voice and stormed out of the meeting. Thereupon, the board held an emergency meeting, where they decided to bar the plaintiff from the office, pending a decision whether to terminate him. He was called at home while sitting with his wife and told not to come back to work as they were investigating him as well as the potential affair. Needless to say when he told his wife, it created some tense moments. The Board invited the plaintiff to attend a meeting where they laid out the conclusion of their investigation that essentially blamed him for poor morale amongst the employees. He was given a chance to rebut their claims and read a prepared statement. The Board then went to an executive session and decided to terminate the plaintiff.

The plaintiff filed an FOIA complaint and brought an action for breach of contract and breach of implied covenant of good faith and fair dealing. The jury awarded the plaintiff \$100,000 in economic damages and \$100,000 for emotional distress damages for breach of covenant of good faith and fair dealing. On appeal, it was held that inserting the term "just cause" into an employee agreement substantially limits the employer's discretion to terminate the employee. It requires substantial reasons for termination which, in turn, become a question of fact for the jury. Although the employer claimed that there was substantial cause with their findings that the plaintiff had created a hostile work environment and did not have a good working relationship with the Board, there was contrary evidence as to how much inquiry had been made to reach these conclusions, and that the plaintiff was doing an okay job. Therefore it was up to a jury to resolve those conflicting facts.

Claims that plaintiff was improperly handling the newly-hired manager were also contradicted, and there was never evidence of any affair. While the Board claimed he was not getting along with them, the plaintiff complained that was because he would not hire friends or political allies of the Board members, and therefore, was deemed not a *team player*. While acknowledging employee morale was low, the plaintiff attributed that to changes in procedures and computer glitches. Thus, although the plaintiff and defendant

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had differing versions of the facts, the jury was free to credit the testimony of either side, and disregarded the plaintiff's stated reasons for why there was substantial cause to discharge the plaintiff.

The court also did not have a problem with the Trial Court's jury instruction that an employer seeking to terminate an employee for cause must do more than merely point to an act of insubordination or misconduct that justifies termination, because if that were the case, the employee's less-than-perfect conduct would always constitute just cause.

Even though it is found that Connecticut does not recognize emotional distress damages arising merely from termination of employment, even when the termination is wrongful, there can be damages for breach of covenant of good faith and fair dealing in the manner of termination. The plaintiff presented substantial evidence of the emotional impact on his life after the board told him not to return to work and basically accused him of having an affair in front of his wife and kicked him out on trumped up charges.

The defendant also claimed that the Trial Court should not have admitted into evidence the finding of the FOIC that the convening of an executive session violated the provisions of FOIA. The plaintiff claimed this was probative of the plaintiff's claim that the defendant acted with malice in the breaching of the covenant of good faith and fair dealing. The FOIC found that there was no emergency to justify the meeting, and there had been no agenda posted. The plaintiff had alleged that the Board searched for a pretext to terminate his employment and intentionally held the meeting without notice to the public in order to avoid complying with FOIA. The court concluded that evidence of the manner of calling the meeting was relevant to the jury's determination as to whether the defendant had acted in bad faith, and therefore, it was not error for the Trial Court to allow the admission of the evidence.

As a fallback argument, the defendant argued, even if it was relevant, an FOIC's finding would tend to unduly influence the jury and prejudice them, and should have been excluded for that reason. The court replied that the FOIC never made a finding that the defendant had acted in bad faith, and thus, it was unlikely that the FOIC's findings would unduly arouse the jurors' emotions, hostility or sympathy.

Judge Beech issued a concurring decision with respect to the FOIC ruling, to point out that, as a general proposition, decisions of administrative agencies or of other courts are *not* admissible to prove the matters stated therein, absent the requirements of *res judicata* or collateral estoppel having been met. The Judge noted that this argument was not made on appeal, however.

- [AC36635 - O, R & L Commercial, LLC v. Colt Gateway, LLC](#)

The Appellate Court reversed summary judgment granted to the property owner in this brokerage fee dispute. The brokerage listing provided that the agent was entitled to a commission for any tenant procured during the term of the listing agreement or any tenant with whom the broker had been negotiating with before the expiration, if any type of lease was entered into with them within one year. The commission was to be paid in

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accordance with an attached schedule. The attached schedule had additional language that seemed to expand the commission obligation by stating the obligation survived the termination of the agreement and included any renewals or expansions of any lease with a tenant procured by the broker. The broker sued for a commission when a tenant it procured entered into a new lease to take additional space within the complex two years after the expiration of the agreement. The trial court held that the additional language in the schedule was meaningless as it made no sense and would render meaningless the restrictions on a commission entitled in the main agreement. This decision held that the trial court should not have tried to figure out which interpretation made more sense on S.J. because that was an admission that the agreement was ambiguous and thus not the proper subject of a summary judgment motion. The intent of the parties would be ascertained in a fact finding setting. For that purpose the defendant/owner was told it could not reply on its argument to charge the ambiguity against the drafter - the broker, because both parties were sophisticated commercial entities and the court will not apply that rule under those circumstances.

- AC36241 - [Barbour v. Barbour](#)
- AC36120 - [Mitchell v. Commissioner of Correction](#)

The facts and holdings of any case may be redacted, paraphrased or condensed for ease of reading. No summary can be an exact rendering of any decision, however, so interested readers are referred to the full decisions. The docket number of each case is a hyperlink to the Connecticut Judicial Department online slip opinion. Copyright 2015 Pullman & Comley, LLC. All Rights Reserved.

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