IN THIS ISSUE

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Quick Links -

Greetings!

Welcome to the June 2011 edition of our monthly newsletter. This month we have included an article written by Attorney Peg Sheahan, addressing recent developments regarding domestic violence and unemployment qualification.

Attorney Bob Mitchell has also included an article this month. His article addresses the National Labor Relations Act and various cases that have since been brought to the National Labor Relations Board as well as their results and rulings.

As always, thank you for reading. If you have any suggestions for future articles or have any questions about the articles included in this month's newsletter, feel free to contact us.

Family Violence Issues for Connecticut Employers

By Margaret M. Sheahan

Full disclosure: Preventing, eradicating and providing healing response to the victims of domestic violence happen to be causes to which I personally devote time and treasure, primarily by supporting the Center for Women & Families of Eastern Fairfield County.

Recent developments in law all over the country reveal increasing willingness by American society to bring this problem out of the shadows and combat it openly. Like most legislative social response, these measures call on employers to take a laboring oar.

In Connecticut, the need to leave employment to respond to a

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domestic violence situation is now a "good cause" reason that keeps an individual from being disqualified from receiving **unemployment compensation**. The "quit" can be to protect the employee or his/her spouse, parent or child from becoming or remaining a victim of domestic violence situation for the employee or the employee's child. Conn. Gen. Stat. § 31-236 (a)(2)(A(iv). The employee must have made efforts to maintain employment. The employer's account, however, is not charged for benefits awarded for this kind of termination. This provision relies on a definition of "domestic violence" from the Social Services section of the statutes. "Victim of domestic violence" means a person who has been battered or subjected to extreme cruelty by: (A) Physical acts that resulted in or were threatened to result in physical injury; (B) sexual abuse; (C) sexual activity involving a child in the home; (D) being forced to participate in nonconsensual sexual acts or activities; (E) threats of or attempts at physical or sexual abuse; (F) mental abuse; or (G) neglect or deprivation of medical care. Conn. Gen. Stat. § 17b-112a.

Connecticut has also enacted a requirement for employers of three or more workers, including the State itself and its political subdivisions, to grant **leave** to employees who are victims of family violence. The leave is available to any employee regardless of length of service or amount of hours worked. The leave is available to any employee regardless of length of service or amount of hours worked. This statute, Conn. Gen. § 31-51ss, took effect on October 1, 2010.

For purposes of this leave statute, family violence is defined as follows;

"Family violence" means an incident resulting in physical harm, bodily injury or assault, or an act of threatened violence that constitutes fear of imminent physical harm, bodily injury or assault between family or household members. Verbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur. Conn. Gen. Stat. § 46b-38a.

It is important to understand as well how broad the social network of "family" expands for purposes of this leave statute.

"Family or household member" means (A) spouses, former spouses; (B) parents and their children; (C) persons eighteen years of age or older related by blood or marriage; (D) persons sixteen years of age or older other than those persons in subparagraph (C) presently residing together or who have resided together; (E) persons who have a child in common regardless of whether they are or have been married or have lived together at any time; and (F) persons in, or have recently been in, a dating relationship. Id.

The statute requires that an employee who is a victim of family violence be permitted to take leave whenever it "is reasonably necessary (1) to seek medical care or psychological or other counseling for physical or psychological injury or disability for the victim, (2) to obtain services from a victim services organization on behalf of the victim, (3) to relocate due to such family violence, or (4) to participate in any civil or criminal proceeding related to or resulting from such family violence."

In another important provision, the statute explains that

"Leave" includes paid or unpaid leave which may include, but is not limited to, compensatory time, vacation time, personal days off or other time off.

A question arises from the omission of "sick time" from the statutory language. The general nature of the definition and the use of the "not limited to" phrase indicate that sick time use is included in what the employer must permit, regardless of how this may conflict with employer rules about the circumstances under which sick time may be used (e.g., that the employee must be sick!).

The employee must be permitted to use available paid leave or, if all such paid leave has been exhausted, to be absent without pay for up to twelve days in a calendar year. The 12-day limit applies to the unpaid portion of such leave, so that an employee entitled to paid time off of more than 12 days may actually use more than 12 days to address the family violence situation.

An employer who discharges or threatens or penalizes or coerces an employee for taking or requesting such leave or "in violation of this statute", the employee has 180 days to start a civil action against the employer in which damages, attorneys' fees and reinstatement can be awarded.

The statute has two interesting provisions that may pose compliance conundrums. One provides:

> Leave under this section shall not affect any other leave provided under state or federal law.

Does this mean that if leave to seek care for injury or disability of an employee who is a family violence victim is also leave occasioned by a serious health condition it cannot be counted as FMLA utilization? Or does it mean the exact opposite? I think the latter answer is correct but the language is less than clear.

The other puzzling provision reads:

> Nothing in this section shall be construed to . . . diminish any rights provided to any employee under the terms of the employee's employment or a collective bargaining agreement, or . . . preempt or override the terms of any collective bargaining agreement effective prior to October 1, 2010.

Again, the better reading in my view is that this permits simultaneous satisfaction of parallel obligations under the statute and any employer policy or practice or union contract provision; however, the language might permit different interpretation.

The statute permits the employer to require not more than 7 days advance notice of such leave when the need for it is foreseeable and as prompt as possible notice when the need for such leave is not foreseeable. The employer may also require proof of the family violence nature of the leave in the form of a signed written statement

from the employee and a document from a court, the police, a family violence service organization, an attorney, the Judicial Branch's Office of Victim Services, Office of the Victim Advocate or a licensed medical or other professional from whom the victim has sought assistance with family violence. Any such documentation the employer obtains must be maintained in confidence. Disclosure to comply with federal or state law or to preserve the employee's safety in the workplace is permissible provided advance notice of the disclosure is given to the employee.

The question arises whether employers should promulgate policies about these benefits. I believe this is a question of the organization's culture. I am not a fan of employer's adopting policies unless truly necessary. The real need here is to educate your supervisory staff and others with absence control responsibility to make sure compliance is on their radar screens.

The NLRB Raises New Issues for the Non-Union Employer

By Bob Mitchell

A year ago, I wrote an article about the National Labor Relations Act's protections for non-union employees. I addressed the question of an individual employee's ability to bring charges before the National Labor Relations Board for employment discrimination violative of the NLRA. In addition to providing remedies to individual non-union employees who engage in protected concerted activities, the Board often holds some types of employer policies to be generally illegal. These decisions most often arise in the context of an individual complainant's case, but their applicability is of much wider application.

This employer policies issue gained a fair amount of traction earlier this year when the NLRB issued a complaint against a Connecticut ambulance company because it had disciplined an employee for violating its internet and anti-disparagement policies. In American Medical Response of Connecticut, Inc., Case No. 34-CA-12576 (34th Region 2011) the NLRB in Hartford objected to the employer's social network policy's statement that,

> "[e]mployees are prohibited from posting pictures of themselves in any media, including but not limited to internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting"...."[e]mployees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors"

The NLRB's Hartford Regional Director found that this policy violated the NLRA because it adversely impacted the Employees' rights to engage in protected concerted activity. The Regional Director's opinion on this topic was not tested in court, because the ambulance company decided to settle before trial.

Recently, the Connecticut Regional Director's position was reflected in the Chicago Region's decision to issue a complaint in a similar case, charging a Chicago area BMW dealership with unlawfully terminating an employee for posting critical photos and comments on Facebook.

Following promotional event, one sales employee posted photos and commentary on his Facebook page complaining that only hot dogs and bottled water had been offered to customers. He apparently feared sales commissions could suffer as a result of the meager food and beverage offerings.. Other employees had access to the Facebook page. Although the complaining employee removed the posts when asked to by management, he was fired. The Regional Director contends that the Facebook postings were protected by the Act and unless the case settles, it will go forward to trial this summer.

Over the years a number of other common employment policies have also been held to violate the Act. Some may surprise you. For example, it has long been uniformly held that compensation confidentiality provisions violate an employee's right to participate in concerted activities protected by the Act. In Bryant Health Center, Inc., 353 NLRB No. 80 (2009), a policy that,"[a]ll salary, performance appraisals & increase information should be kept confidential and should not be discussed among staff...[p] lease be respectful to other staff members and do not try to 'compare' salary information" was found to violate the NLRA. Generally speaking, any effort to limit employees' right to compare or discuss pay, benefits or other employment terms and conditions will be held illegal if tested in front of the NLRB.

A particularly interesting issue came up in U-Haul of California, 347 NLRB 375 (2006. In that case, the NLRB held illegal an employer's rule requiring that employment disputes be submitted to arbitration. Specifically, the rule in question stated that it applied to,

> "all UCC [U-Haul Company of California] employees, regardless of length of service or status and covers all disputes relating to or arising out of an employee's employment with UCC or the termination of that employment. Examples of the type of disputes or claims

> covered by the UAP include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendment, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations"

Continued employment was considered enough to bind the employee to the arbitration process by the policy. In this case the rule was held illegal because it inhibited employee access to the Board itself, and, thus, to the Board's grant of protection to the employees' concerted activity rights.

In Trump Marina Associates, LLC D/B/A Trump Marina Casino Resort, 54 NLRB No. 123 (2009), appeal pending sub nom., Trump Marina Assocs., LLC D/B/A Trump Marina Hotel and Casino v. NLRB, Nos. 10-1261 & 10-1286 (D.C. Cir. 2011), the Board objected to employer rules that interfered with the right of employees to talk to the media. Specifically, Respondent's Handbook Rules on Talking to the Media barred employees from, "[r]eleasing statements to the news media without prior authorization"; provided that only the "Chief Executive Officer, the respective property's Chief Operating Officer, General Manager or Public Relations Director/Manager" were authorized to speak with the media and that "any departure" from the rules would subject the guilty employee to disciplinary action up to and including discharge. The NLRB concluded that these rules inhibited employees from freely participating in protected concerted activities and were therefore objectionable.

Other types of rules that have been questioned by the Board include all sorts of non-solicitation employer policies. The Board does not like no-solicitation rules as a general matter, because of their historic negative impact on union organizing activity. The NLRB, however, distinguishes between oral and written solicitations. Oral solicitations are generally prohibited only during working time, but must be permitted during break times and other non-working periods, even in work areas. Distribution of written literature can have these same restrictions, but can also be restricted within working areas during non-working time.

A final note for this issue takes us back to the internet once again. In Guard Publishing Co. v. N.L.R.B. ,571 F.3d 53 D.C. Cir., 2009), an employer's internet policy stating that,

> "[c]ompany communication systems and the equipment used to operate the communication systems are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations."

failed the test, because of the way it was applied.

The employer was aware that employees were using the email system, to send and receive personal messages such as baby announcements, party invitations, and the occasional offer of sports tickets or request for services like dog walking." In this case, the Company was found guilty of unfair labor practices because it discriminated against messages relating to protected concerted employee activity as opposed to those non protected activity emails.

As unions have faded into the background, many employers have lost their concern for whether particular policies might violate the Act, but as the Board looks more often at employee rights in a non-union context, companies that have strayed too far into such questionable policy mandates may find their rules not only unenforceable but a source of legal liability to the disciplined employee.

Community Corner

As Peg's note at the beginning of her article this month references, we like to be involved in not-for-profit organizations that further missions we endorse. For example, Bob serves on the Board of the Connecticut Zoological Society, which governs the Beardsley Zoo in Bridgeport and Peg is long-time Vice-Chair of the Board of the Women's Business Development Council (WBDC), headquartered in Stamford. We've decided this newsletter is a good vehicle for us to share some of the news coming out of our "causes." Who knows? Maybe you know of a person, initiative or organization that could be useful to us in one of our volunteer roles and this will prompt you to share that with us. In any event, we want to lend what little voice this newsletter may have to the organizations we support, so you can check your future issues for information like this.

Soundwaters' Tall Ships Ball was a good time for all who attended and a successful fundraiser for this not-for-profit devoted to education about the environment of Long Island Sound, which reaches students all over our region and does much of its teaching aboard a beautiful schooner. Bob is Chair of Soundwaters' Board and he was instrumental in changing the event from a black tie gala to a Parrot-head, Cheeseburger-in-Paradise party. Governor Malloy attended to lend his voice to the event's praise for Building & Land Technologies, so instrumental in the development of Stamford and s

WBDC did Peg the enormous honor of nominating her as SBA's 2011 Connecticut Women in Business Champion and she accepted the award at a breakfast event in New Haven along with seven other great Connecticut people who similarly support veterans, minorities, family-owned, exporting, government subcontracting, financing in small business in our State. Entrepreneurship is alive and well and working hard in the Nutmeg State.

Thank you for reading!

Sincerely,

Mitchell & Sheahan, P.C.