2020 Developments in Labor and Employment Law in Connecticut

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COVID-19 led to a dramatic change in the meaning of work. Employers adjusted to a remote work force, and millions lost their jobs. COVID-19's impact on the courts cannot be understated. After March 2020, there were no jury trials in Connecticut and only a few bench trials. Deadlines and statutes of limitation were suspended. Attorneys adjusted to remote depositions, mediations, judicial conferences, and court arguments. The long-term impact of this new world remains to be seen. But in the intermediate term, the courts and counsel will be dealing with a backlog of trials and new and unsettled legal issues arising from COVID-19.

FEDERAL LAW DEVELOPMENTS

Federal Legislation

Federal employment legislation in 2020 was a response to the economic crisis created by COVID-19 and the subsequent lockdown. Congress passed two laws—the Families First Coronavirus Relief Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES)—that provided benefits to workers and employers affected by COVID-19.

FFCRA (1) provided two weeks paid sick leave for employees affected by COVID under certain circumstances; and (2) up to ten additional weeks paid emergency family leave for employees who had to stay home for childcare due to COVID for employers with 1 – 500 employees.

The CARES Act (1) provided a one-time stimulus check for eligible individuals and families; (2) broadened the eligibility standard for unemployment benefits to include independent contractors, gig workers, and others who were otherwise ineligible for unemployment; (3) provided an additional $600 weekly compensation benefit for 13 weeks for anyone receiving unemployment during the prescribed time period; (4) provided an additional 13 weeks of unemployment once state unemployment eligibility expired; and (5) provided loans to employers who maintained their workers on their payroll that were forgiven if the employer met certain criteria.

Federal Court Decisions

1. United States Supreme Court Decisions

a. Under Title VII, Discrimination "because of sex" Applies to Gay, Lesbian, and Transgender Employees

The most significant decision in 2020 was *Bostock v. Clayton County Georgia*, ___ U.S. ___, 140 S.Ct. 1731(2020). The court ruled in a 6-3 decision that the "because of sex" language in Title VII of the Civil Rights Act of 1964, (42 U.S.C. 2000e *et seq*.) ("Title VII") covered discrimination based on an individual's sexual orientation and sexual identity. The decision was written by Justice Gorsuch, and the three dissenting justices[1] argued the lack of legislative intent to cover discrimination based upon sexual orientation and sexual identity when Title VII was enacted. Justice Gorsuch had little trouble rejecting these arguments based upon his judicial philosophy:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

140 S.Ct. at 1737.

At the time *Bostock* was decided, only 21 states prohibited discrimination in employment based upon sexual orientation. *Bostock* represented a significant expansion of civil rights for LGBTQ persons in the workplace.

b. "But-For" Causation Can Encompass Multiple Causes.

In *Bostock*, the court also distinguished the "but-for" causation standard in discrimination cases from a stricter "sole" causation standard. An adverse employment action may have multiple "but-for" causes:

> In the language of law, this means that Title VII's "because of" test incorporates the "simple and traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened "but-for" the purported cause. See *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

> This can be a sweeping standard. Often, events have multiple but-for causes… When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision.

140 S.Ct. at 1739. Justice Gorsuch noted the "motivating factor" standard, applicable under Title VII discrimination claims, is a more forgiving standard because liability may follow "even if [the protected trait] was not a but-for cause of the employee's employment decision. 140 U.S. at 1740.

c. But-For Causation Standard Applies in 42 U.S.C. § 1981 Cases/But-For Causation is the Default Standard of Causation in Federal Statutory Claims

The Civil Rights Act of 1866 (42 U.S.C. §1981) was passed after the Civil War and stated that all male persons born in the United states are citizens "without distinction of race or color, or previous condition of slavery or involuntary servitude." It has been broadly interpreted to cover persons of color with respect to their employment contracts.

In *Comcast Corporation v. National Association of African American-Owned Media, et al*, ___U.S. ___, 140 S. Ct. 1009 (2020), the Supreme Court held that the plaintiff in a §1981 case had the burden of proving "but-for" causation of injury, as opposed to the substantial factor causation standard used under Title VII.

In *Comcast*, the court noted that the but-for tort standard is the general standard applied under common law tort cases. The court indicated that this "ancient and simple" causation test is the default background rule against which Congress is normally presumed to have legislated when creating causes of action, including federal antidiscrimination laws. 140 S. Ct. at 139-140.

d. But-For Causation Does Not Apply Under the Age Discrimination in Employment Act Provision Covering Federal Employees.

In *Babb v. Wilkie*, ___U.S. ___, 140s. Ct. 1168 (2020), the Supreme Court held that the section of the Age Discrimination in Employment Act that covers federal employees provides a broader causation standard than the discrimination provisions covering private employers.

The language of the ADEA covering federal employees states in pertinent part that personnel actions affecting individuals aged 40 and older shall be "*made free from* any discrimination based on age…" 29 U.S.C. §633a(a). In contrast, the provision covering private sector uses the "because of age" language that has been held to apply the but-for causation standard. 29 USCA § 623(a). The court stated that the difference between the term "made free from any discrimination" indicates a broader standard than the "but-for" "because of . . .age" language in the section of the ADEA.

e. Religious School Teachers Not Protected by State and Federal Labor and Employment Laws Under First Amendment Free Exercise of Religion Clause.

In *Our Lady of Guadeloupe School v. Morriey-Berru*, 140 S.Ct. 2049 (2020), the Supreme Court expanded the "ministerial exception" articulated in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) to teachers at private religious schools. Religious institutions are protected by the Free Exercise Clause of the First Amendment from lawsuits brought under federal and state discrimination laws brought by teachers in their schools. The exception applies even if the teacher may not be a practicing member of the institution's religion.

2. Second Circuit Decisions

a. 42 U.S.C. §1983 First Amendment Retaliation

In *Agosto v. New York City Department of Education*, 982 F. 3rd 86 (2d Cir. 2020), the Second Circuit addressed the distinction between constitutionally protected employee speech, which addresses issues of political and social concern, and unprotected speech focused on personnel issues. The court ruled that a complaint about a failure of the Board of Education to properly apply its internal grievance procedures is a personnel issue and does not rise to the level of protected speech. The court also indicated that in evaluating whether speech is constitutionally protected, it is necessary to examine the underlying motivation. A request for budgetary information may be constitutionally protected speech under certain circumstances, but not if it is motivated by a personal grievance. The courts also questioned whether minor payroll discrepancies amongst department staff rose to the level of a protected public concern, even if they are not motivated by personal grievances.

b. Title VII Hostile Work Environment

In *Rasmy v. Marriott International, Inc.*, 952 F. 3rd 379 (2d Cir. 2020), the Second Circuit determined that the trial court improperly excluded consideration of incidents of harassment that were not directly discriminatory, such as accusing the employee of being a "rat" or filing false workplace complaints against the employee, if other circumstances indicate that it was part of a racially hostile environment. In addition, certain comments and behavior that were not specifically directed against the plaintiff may also be a part of the hostile environment if the plaintiff was aware of them. Lastly, the court held that there was no requirement of physical threat in order to prove the existence of a hostile work environment.

c. ADA – Disability

In *Woolf v. Strada*, 949 F. 3rd 89 (2d Cir. 2020), the Second Circuit held that an individual who claims disability working for a particular supervisor due to migraines aggravated by workplace stress but is able to work under a different supervisor is not "disabled" under the Americans With Disabilities Act because it not a substantial limitation on the ability to work in a class or a broad

range of jobs. This decision may make it difficult for employees who claim disability due primarily to workplace stress to bring a claim under the ADA.

3. Connecticut District Court Decisions

a. Discrimination

i. *McDonnell-Douglas* Standard

In *Cellmark v. Pollard*, 2020 WL 5732455 (D. Conn. 2020), Judge Hall held that a senior executive's statement to the employee that they "expected him to retire soon," coupled with the prima facie case, plus evidence that the employer's proffered reason for termination was pretextual was sufficient to overcome the employer's motion for summary judgment.

In *Velez v. Town of Stratford*, 2020 WL 1083625 (D. Conn. 2020), the employer argued that the employee's poor performance in the position as training lieutenant meant that he was not "qualified" under that prong of the prima facie case. The court held that the employee met the threshold for the prima facie case, because he had been performing in the job for a reasonable period of time before the performance issues arose.

In *Bracey v. Waterbury Board of Education*, 2020 WL 1062939 (D. Conn. 2020) the district court denied summary judgment on one of the employee's race discrimination claims. The court stated that a reasonable juror could find that a supervisor's comment that the employee "was not a good fit" reflects racial animosity.

ii. Adverse Employment Action

In *Velez*, *supra*, Judge Bolden ruled that the transfer of a training lieutenant to a position as the midnight commander of the patrol division was not an adverse employment action under Title VII or FEPA. A job transfer that does not cause economic loss is insufficient unless "the change in responsibilities is a setback to one's career."

iii. Fair Employment Practices Act – Causation Standard

In *Zeko v. Encompass Digital Market*, 2020 WL 3542323 (D. Conn. 2020), Judge Shea indicated that FEPA age discrimination cases and federal ADEA cases both apply the same "but for" causation standard. This appears to be a change in Judge Shea's position. In *Weisenback v. LQ Management*, 2015 WL 5680322 (D. Conn. 2015), he indicated that although no Connecticut Appellate Court had ruled on the FEPA causation standard, he applied the broader "motivating factor" standard.

iv. Failure to Promote

In *Zeko, supra*, Judge Shea held that an employee's failure to apply for a promotion was not a requirement to a discriminatory failure to promote claim. The employee had made inquiries about promotional opportunities, but his supervisor made comments to him that made clear that he would not be promoted if he applied. The court held that his failure to formally apply for the position was not necessary to pursue the claim; his application for the position would have been futile.

v. Employer Liability for Co-Worker Harassment

In *Benitez v. Jarvez*, 2020 WL 1532306 (D. Conn. 2020), Judge Bryant delved into a thorough and detailed analysis of employer liability for a racially hostile environment created by multiple non-supervisory employees. Any attorney litigating a hostile environment case based upon the actions of non-supervisory employees would do well to review the decision.

vi. Retaliation – Causation

In *Byrne v. Yale University, Inc.*, 450 F. Supp. 3rd 105 (D. Conn. 2020) a faculty member claimed retaliation for complaints of sex discrimination and breach of contract in the decision to deny tenure. The employee had not made specific complaints about discrimination or sexual harassment, but she participated in a "Climate Review" investigation of the Department. During that investigation, she provided details of sexual harassment. The defendant argued that the senior faculty members who had voted against her tenure had no specific knowledge of what the employee had said during the investigation, and that there was insufficient causal connection. The court held that even though they did not have specific knowledge of her communications in the Climate Review investigation, there was sufficient evidence to conclude that the senior faculty members believed that she had provided such evidence. This was sufficient to raise an issue of fact as to discriminatory intent.

b. 42 U.S.C. §1983: First Amendment Retaliation

In *Brown v. Office of State Comptroller*, 456 F. Supp. 3rd 379 (D. Conn. 2020), the court gave a detailed analysis of when employee speech as a private citizen is protected under the First Amendment or unprotected speech where the speech was part of the employee's official duties, pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The employee, an attorney in the Office of the Comptroller, argued that certain communications to state auditors were protected speech. The court distinguished between communications with auditors made before and after she had filed a state whistleblower complaint. The court held that the speech to the auditor prior to her whistleblower complaint was made pursuant to her official duties and thus not protected speech under *Garcetti*. In contrast, her communications with the state auditors after she had filed her whistleblower complaint were protected speech, since it was related to the investigation of her whistleblower complaint and not part of her job duties.

The court also ruled that the employee's refusal to submit false statements to the State Employee Retirement Commission, to the IRS compliance attorney and to the IRS were protected speech because it potentially exposed the employee to criminal charges. The district court held that submission of false statements expos-

ing the employee to criminal charges is never a part of a public employee's official duties.

c. Non-Compete/Non-Solicitation

In *Cellmark v. Pollard*, 2020 WL 5732455 (D. Conn. 2020), Judge Hall denied the employer's motion for summary judgment as to whether the employee violated his non-solicitation agreement. The employee argued that the employer violated the employment agreement prior to any alleged violations of the non-solicitation provision. The court held that if there had been a material breach by the employer, the employee would be excused from further performance under the employment contract, including the non-solicitation provision.

d. Negligent Misrepresentation

In *Corcoran v. G & E Real Estate* 2020 WL 5300255 (D. Conn. 2020), the employee claimed that he was discharged for an old criminal conviction that the employer knew about and had previously assured him would not be a basis for termination. Although the court granted the employer's Motion to Dismiss on other grounds, it recognized that an employer's representation that the employee will not be terminated for a particular reason or for a particular period of time modified the at will relationship and could be a basis for a negligent misrepresentation/promissory estoppel claim. In this instance, based upon the employer's alleged representation, they could not terminate the employee for his prior criminal conviction.

e. Wrongful Discharge

In *Corcoran, supra*, the court granted the employer's Motion to Dismiss the employee's wrongful discharge claim. The employee argued that his discharge for a prior felony conviction, of which the employer had been aware for several years, violated the public policy embodied in Conn. Gen. Stat. §31-51i (limitations upon criminal records inquiries in employment applications and employment decisions). Conn. Gen. Stat. §31-51i only addresses criminal charges that had been dismissed and sealed under the erasure statutes. Since the employee's prior conviction was never dismissed, the public policy underling Conn. Gen. Stat. §31-51i was inapplicable.

STATE EMPLOYMENT LAW DEVELOPMENTS

State Legislation and Executive Orders

The legislature was not in session for most of 2020 due to COVID-19. When it met its focus was on COVID-19 and police accountability issues following the death of George Floyd and Black Lives Matter protests.

Governor Lamont passed a series of executive orders regulating essential workers who would continue to work during the lockdown as well as working conditions to address the safety issues presented by COVID-19 in the workplace as more employees returned to work. The Connecticut Department of Economic Development was tasked with issuing a series of workplace guidelines for COVID-19 for various industries as they reopened.

The Paid Family and Medical Leave Act, passed in June 2019, began to be implemented in 2020. The Act provides paid leave benefits to employees who cannot work due to their own serious health condition or that of a family member.[2] The program will be administered by a quasi-public agency, the Paid Leave Authority. Beginning in November 2020, covered employers were required to register with the Paid Leave Authority and the collection of wage deductions began on January 1, 2021. Employees will be eligible to receive benefits starting January 1, 2022. After January 1, 2022, Connecticut's FMLA law will reduce the minimum threshold coverage from employers with at least 75 employees to one.

Connecticut Court Decisions

1. Connecticut Supreme Court Decisions

a. Constructive Discharge

In *Karagozian v. USV Optical, Inc.*, 335 Conn. 426 (2020), the Connecticut Supreme Court held that a plaintiff claiming constructive discharge is not required to allege or prove that the employer intended to force the employee to quit, only that the employer intended to create the *conditions* the employee claims compelled her to quit. A constructive discharge occurs when the defendant created a work atmosphere so difficult or unpleasant that a reasonable person in the plaintiff's shoes would have felt compelled to resign.

b. Wage and Hour: Class Certification

The Supreme Court, in *Rodriguez v. Kaiaffa, LLC*, __ Conn. __ , No. 20274, 2020 WL 5919680 (2020), upheld a class certification of restaurant servers in a break from a majority of trial court decisions denying class certification in tip cases for restaurant workers.

The defendants argued that that a determination of the validity of plaintiff's legal theory was necessary prior to class certification. The Supreme Court rejected this argument. The plaintiff was seeking damages for a company-wide practice of assigning nonservice duties and improperly taking a tip credit. Determination of the validity of this policy would determine liability for all class members, satisfying the commonality and typicality factors of the class certification determination.

The defendant also argued that since it was unclear that all of the purported members of the class had been assigned non-service tasks, the factual differences in the individual cases made class certification inappropriate. The court also rejected this argument. Whether an individual server performed nonservice tasks relevant to individualized damages, rather than the common liability issue.

2. Connecticut Appellate Court Decisions

a. Evidence

In an employment disability discrimination case, *Kovachich v. Dep't of Mental Health & Addiction Servs*., 199 Conn. App. 332 (2020), the Connecticut Appellate Court ruled on several evidentiary issues.

(1) Discussions about potential accommodations made during a CHRO Mandatory Mediation are inadmissible settlement discussions. Conn. Evid. Code §4-8(b)(1).

(2) An adverse party may use the *original* deposition transcript to impeach a party or as evidence of a party admission, even if the adverse party had submitted a corrected or amended response on its deposition errata sheet. Assuming that the original deposition transcript is admitted, the impeached party would be entitled to introduce the relevant portion of the errata sheet on re-direct or rebuttal.

(3) Statements or emails made by union employees acting in their capacity as advocates for the plaintiff are inadmissible as party admissions against their employer. Conn. Code of Evidence §8-3(1)(D). Hearsay statements by a party's agent, servant, or employee must concern a matter within the scope of their agency. In this instance, the statements were not made as part of their regular job duties, since they were acting as advocates for the union.

d. Defamation: Truth as a Special Defense.

In *Gerrish v. Hammick*, 198 Conn. App. 816 (2020), plaintiff sued an officer from his former police department for defamation for telling a subsequent employer that plaintiff would not receive a letter of good standing from the department. At the time no formal decision had been made about the issue, but the defendant officer's police chief subsequently confirmed at a deposition that plaintiff would not have received a letter of good standing. The court granted summary judgment to the defendants. Since the statement was substantially true, it is irrelevant whether or not the declarant was certain that it was true at the time he made the statement.

3. Connecticut Superior Court Decisions

a. Conn. Gen. Stat. 31-51q (Free Speech Protection)

i. Job-Related Safety Complaints When Related to Public Health are Protected Speech.

In *Roach v. Transwaste, Inc.*, No. HHDCV176074305S, 2020 WL 588934 (Conn. Super. Ct. 2020) (Noble J.), the court held that the plaintiff's job-related safety complaints, which included his objection to driving a tractor trailer transporting hazardous waste on a single-tire rather than the double-tire configuration, addressed threats to the public's health and safety. Therefore, they were a matter of public concern sufficient for the jury to find a violation of General Statutes § 31-51q. The court also held that the "substantially motivating factor" standard for causation applies to § 31-51q.

ii. Misuse of Public Resources Is Protected Speech.

An employee's report that a municipal bus driver was operating the bus in areas where no pick-ups or drop-offs were scheduled, and that the bus was parked at a private location for a lengthy period of time related to the misuse of public resources and was a matter of public concern. *Belinsky v. Town of Monroe*, 2020 WL 6204055 (Conn. Super. 2020)(Cordani, J.). The court also concluded that where the plaintiff's report of misuse of public funds was true or made with an honest belief that it was true, it would be unlikely to interfere with the plaintiff's bona fide job performance or her relationship with her employer. A reasonable employer would expect an employee to report misuse of public resources.

iii. Internal Complaint of Assault Were Not a Matter of Public Concern.

In *Sheehan v. Town of N. Branford*, 2020 WL 3058147 (Conn. Super. 2020) (Wilson, J.), an internal complaint that a co-worker assaulted the plaintiff was not constitutionally protected speech under General Statutes § 31-51q, because it did not raise an issue of public concern.

iv. Interference with Job Duties and Working Relationship Is Affirmative Defense to § 31-51q Claim

Under Conn. Gen. §31-51q, even if an employee's speech is constitutionally protected, an employer is not liable if the protected activity substantially interferes with the employee's bona fide job performance or the working relationship. In *D'Amato v. New Haven Bd. of Educ*., 2020 WL 1656202, at *12 (Conn. Super. Ct. Mar. 3, 2020) (Wilson, J.), the court ruled that an employee need not affirmatively plead non-interference with her job performance or her working relationship in her complaint; rather it is an affirmative defense which must be pled by the defendant.[3]

v. Defendant Accusation of Plaintiff's Mismanagement of Department Insufficient to Prevail at Summary Judgment

In *Azrelyant v. Town of Greenwich*, 2020 WL 6121352, at *1 (Conn. Super.2020) (Povodator, JTR), the plaintiff, the head of the Greenwich Parking Authority, claimed to have been discharged in retaliation for her complaints about corruption and financial mismanagement in the department. The defendant conceded that she had made the complaints, and that the complaints were protected speech involving a matter of public concern but argued that she was to blame for the corruption and mismanagement due to her poor oversight. The court denied defendant's motion for summary judgment and held that whether the defendant's accusations were a legitimate justification for her discharge was an issue of fact.

b. Obligation of Good Faith and Fair Dealing: Contractual Severance

In *Azrelyant, supra*, the plaintiff had an employment contract with the Town of Greenwich that provided for severance in the event of the termination of her employment. After her discharge, the defendant refused to pay her the contractual severance unless she executed a release. The court held that this conduct was sufficient to raise an issue of fact as to the breach of the obligation of good faith and fair dealing.

c. Discrimination: Hostile Work Environment

The plaintiff's hostile work environment count, in *Young v. Town of Cromwell*, 2020 WL 3485724, at *1 (Conn. Super. 2020), was legally insufficient where she alleged that she suffered sexual harassment following the cessation of the plaintiff's consensual intimate relationship with the chief of police. The plaintiff did not allege any unwelcome sexual advances, requests for sexual favors or coercion.

d. Wage and Hour: Class Certification

The court granted class certification, in *Belgada v. Hy's Livery Serv., Inc.*, 2020 WL 3058148, at *1 (Conn. Super. Ct. Apr. 20, 2020) (Ozalis, J.), where plaintiffs alleged that the defendants violated the Connecticut Minimum Wage Act by taking deductions from chauffeurs' wages for meal breaks. The fact that there would be differences between the number of hours each chauffeur worked during their meal breaks was insufficient to raise an issue under the commonality or typicality factor. Proof of the hours each chauffeur worked during their meal breaks was an issue of damages, which did not bar class certification.

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NOTES

1. Justices Alito, Thomas, and Cavanaugh dissented.
2. General Statutes § 31-49e *et sec.*
3. *See Matthews v. Dept. of Pub. Safety*, 2013 WL 3306435, at *8 (Conn. Super. 2013) [56 Conn. L. Rptr. 262](Peck,J.), *Algarin v. LB&O, LLC*, 2017 WL 3879306, at *3 (Conn.Super. 2017)(Kamp,J.) and *Schulz v. Auto World, Inc.*, 2016 WL 7135040, at *9 (Conn.Super. 2016)(Elgo, J.). But *see Armstrong-Grice v. Cmty. Health Servs., Inc.*, No. CV106012800S, 2011 WL 1565877, at *3 (Conn. Super. Ct. Mar. 30, 2011)(striking § 31-51q claim for failure to plead non-interference); *King v. Connection, Inc.*, No. CV106015682S, 2011 WL 3211250, at *5 (Conn. Super. Ct. June 20, 2011)(same).