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Harsh Words And Broken Leases

Hostile workplace ruling leads list of key business cases

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The most significant business law case of the year received a great deal of publicity in both the legal and popular press. In *Patino v. Birken Manufacturing Company*, 304 Conn. 679 (2012), an opinion authored by Chief Justice Chase Rogers, the Connecticut Supreme Court unanimously held that Connecticut General Statute § 46a-81c (1) creates a cause of action for hostile work environment claims where employees are subjected to discrimination and harassment based on their sexual orientation. This decision deserves attention from executives and human resource personnel at all businesses, including in the manufacturing environment.

The facts of the case were relatively straightforward. The plaintiff, a machinist employed at a manufacturing company for many years, claimed that he was harassed by his co-workers due to his sexual orientation and that his employer failed to remedy the situation. Beginning in 1991, the plaintiff's co-workers began uttering derogatory slurs for homosexuals in languages such as Spanish, Italian and English while in the plaintiff's presence.

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Although the plaintiff initially did not complain to the company, he recorded the incidents in a diary. Later, the plaintiff told his supervisor about the name-calling, and a meeting was held. The harassment resumed, and the plaintiff again complained, resulting in the transfer of one of the employees to another facility. Unfortunately, the plaintiff's co-workers continued to make derogatory remarks.

For the next several years, the plaintiff wrote numerous letters to the company and also filed five complaints with the Commission on Human Rights and Opportunities. The harassment continued, and, in January 2004, the plaintiff filed his final complaint with the commission, alleging a hostile environment claim under § 46a-81c (1), the sexual orientation discrimination statute. The plaintiff prevailed at trial, and the jury awarded him $94,500 in noneconomic damages.

Significantly, on appeal, the Supreme Court recognized for the first time that § 46a-81c (1) imposes liability on employers for failing to take reasonable measures to prevent their employees from being subjected to hostile work environments based on their sexual orientation. In so concluding, the Supreme Court rejected the company's claim that the absence of the words "hostile workplace" or "hostile environment" from the text of the statute indicated that there is no cause of action for hostile work environment claims.

The Court also disagreed with the company that hostile work environment claims exist only where the derogatory slurs are spoken directly to the plaintiff. Indeed, federal courts have held that discriminatory statements made to others not in an employee's presence can be actionable. Finally, the Supreme Court rejected the company's reliance on the fact that the slurs were spoken in languages in which the plaintiff was not fluent and that one of the Spanish words uttered by the plaintiff's co-workers had a non-derogatory definition. In rejecting these arguments, the Supreme Court noted that they defy "common sense" and "'require the court to espouse a naiveté unwarranted under the circumstances.'"

Anti-Assignment Clauses

In an important decision, the Supreme Court addressed the meaning of an anti-assignment provision contained in a commercial lease in *David Caron Chrysler Motors LLC v. Goodhall's Inc.*, 304 Conn. 738 (2012). In that case, the defendant, a landlord and owner of certain real property, entered into a commercial lease with a tenant, a limited liability company. The lease contained an anti-assignment clause that provided that no part of the lease "shall, by operation of law or otherwise, be assigned . . . without the prior written consent of

[the] [l]andlord, which consent shall not be unreasonably withheld." The plaintiff was assigned the lease without the defendant landlord's consent.

After the parties were unable to resolve a dispute concerning the party responsible for the remediation of certain environmental conditions on the property, the plaintiffs brought suit claiming that the landlord had violated the lease. The trial court found in favor of the defendant landlord, concluding that no contract existed between the parties because the landlord had not consented to the earlier assignment of the lease.

The Supreme Court reversed the decision of the trial count. Applying the rationale from *Rumbin v. Utica Mutual Insurance Co.*, 254 Conn. 259 (2000) (a case involving the assignment of a structured settlement agreement), to commercial leases, the Court determined that because the anti-assignment provision at issue did not contain language stating that any assignment would be rendered void or invalid, an assignment in violation of the provision was merely voidable. Significantly, because there was no record evidence that the landlord had exercised its option to void the lease after the tenant breached the anti-assignment provision, the landlord remained bound by the lease.

Thus, landlords need to be aware that, depending on the contractual language, they can continue to be subject to the rights and obligations set forth in a lease even when the lease is assigned to another tenant in contravention of an anti-assignment provision.

Arbitration

As in the past several years, the Supreme Court issued another arbitration decision that deserves attention from the business community. In *City of New Britain v. AFSCME, Council 4, Local 1186*, 304 Conn. 639 (2012), the Supreme Court issued a decision concerning the arbitrability of a dispute and emphasized the need for express and precise language in arbitration agreements.

In *AFSCME*, the plaintiff city and the defendant labor union had a collective bargaining agreement, in which they agreed to use arbitration to redress all "upgrades that have not been resolved in negotiations." After the plaintiff and defendant negotiated certain upgrades, including ones in which subordinate employees received upgrades that increased their pay while the foremen did not, the parties signed a memorandum of understanding, stating that "the parties agree that arbitration shall *not* be used to redress all upgrades that have not been resolved in the negotiations."

Making matters more complicated was that the parties later entered into a settlement agreement that provided that the defendant was permitted to file a grievance regarding the upgrades at issue (namely, foreman pay) and seek immediate arbitration, although the issue of arbitrability was not waived.

The plaintiff disputed that the matter was subject to arbitration before the arbitration panel, the trial court and the Appellate Court, but lost on that issue each time. The Supreme Court reversed the judgment of the Appellate Court, however, and noted, among other things, that the plaintiff never agreed to arbitrate the foremen's pay dispute and that the memorandum of understanding contained an explicit agreement not to arbitrate any disputes about other pay upgrades.

Although the settlement agreement stated that the defendant could file a grievance, it did not change the parties' agreement to avoid arbitration. Instead, the agreement preserved the plaintiff's right to raise the defense of non-arbitrability. Accordingly, the Court held that the plaintiff could not be compelled to arbitrate. Ultimately, this decision serves as a reminder to business owners to carefully draft agreements to arbitrate if the goal is to protect the right of arbitration. ■