Parsing Public Policy

By CHARLES D. RAY

In a true "at will" employment relationship, an employer has the ability to fire an employee at any time, for any reason, or for no reason at all. On the flip side, an employee is free to leave their employment under the same terms. And while an employee's ability to leave a job has remained largely intact over the years, an employer's ability to fire employees has been curtailed to a degree, largely by way of statutory prohibitions, but also by way of a judicially created public policy exception to the at will employment doctrine.

Under the exception, first enunciated by the Supreme Court in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471 (1980), an employee is able to state a claim for wrongful discharge if they can prove a "demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." *Id.* at 475. Important public policies can derive from statutes, constitutional provisions, or judicial decisions. But the exception is a narrow one, and the public policy relied on is supposed to be one that has been "clearly articulated." In the case of a statute, the public policy should be no broader "than that represented in the statute." And a claim based on a statute will fail if a plaintiff is unable to establish a material issue of fact as to whether the defendant actually violated the statute in question.

The Supreme Court applied these principles in *Dunn v. Northeast Helicopters Flight Services, LLC*, SC 20626 (March 21, 2023). Mr. Dunn's claim of public policy centered on General Statutes § 31-73, a reasonably old piece of convoluted writing, the aim of which is to prevent employers from exacting monetary gain from employees in return for employment or continued employment. Based on Mr. Dunn's allegations, the operative language is in § 31-73(b) and provides that "[n]o employer…shall, directly or indirectly, demand, request, receive or exact any…sum of money…from any person…upon the representation or the understanding that such…sum of money…is necessary to secure employment or continue in employ-

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ment." Violations carry the possibility of both a fine and imprisonment.

Mr. Dunn is a helicopter flight instructor and began working for the defendant in 2006. During the course of his employment he was promoted to chief pilot and held that position for about eleven years. No contract governed the employment relationship. At some point, Mr. Dunn discussed with the defendant's owner (Mr. Boulette) the possibility of Mr. Dunn becoming an examiner for the Federal Aviation Administration. As an FAA examiner, Mr. Dunn would be able to earn fees based on his testing of student pilots.

A position for an FAA examiner opened in the region in 2017. Mr. Dunn claims that Mr. Boulette urged him to pursue the opportunity. In order to do so, however, Mr. Dunn needed to attend training in Oklahoma. He approached Mr. Boulette about a loan to cover costs and Mr. Boulette agreed, provided that the loan be repaid from Mr. Dunn's future examination fees and that Mr. Dunn also split any additional examination fees on a 50/50 basis. Although Mr. Boulette thought Mr. Dunn had agreed to the repayment and fee split deal, in fact, Mr. Dunn paid his own Oklahoma expenses. When he informed Mr. Boulette's wife (an employee) that he would not agree to split future FAA examination fees, Mr. Dunn was told to clean out his desk and that he was no longer an employee.

Both sides moved for summary judgment. The trial court granted the defendant's motion, concluding that the evidence, even construed in favor of the plaintiff, did not establish a violation of § 31-73. The Appellate Court agreed with this conclusion, and added that § 31-73 was inapplicable anyway, because the fee-sharing arrangement requested by the defendant could not be attributed to the plaintiff's employment relationship with the defendant. Thus, at the Supreme Court, the issues were whether the statute applied at all and, if it did, whether the plaintiff's evidence was sufficient to make it past summary judgment.

The majority (Justice McDonald for himself and Justices D'Auria and Ecker) answered "yes" to both questions. In doing so, Justice McDonald first noted that because it is a remedial statute, § 31-73 should be construed in a manner that furthers that remedial purpose. A key part of the majority's analysis stems from the fact that the statute prohibits an employer from either "directly or indirectly" demanding or requesting a sum of money for an employee or prospective employee. The inclusion of the phrase "evidences the legislature's contemplation of both explicit communications—such as overt threats or demands—as well as interactions of a more tacit or unspoken nature—such as insinuated or implicit demands or requests."

In terms of the applicability of the statute, the majority first concluded that the phrase "sum of money" was unambiguous and broad, and can include "earnings or other money, whether the source is related or unrelated to the employment relationship at issue." Next, the majority rejected the defendant's contention, adopted by the Appellate Court, which the statute does not apply to private business dealings between parties, even when an employment relationship exists. For the majority, such a narrow construction flies in the face of the broad language used by the legislature. "In short, the statute is aimed at preventing an employer from exercising authority over an employee to require that employee to turn over funds that belong to the employee, regardless of how those funds are obtained by the employee."

The majority next turned to the requirement that the plaintiff prove that the request for the fee sharing was made "upon the representation or the understanding that such…sum of money…is necessary to secure employment or continue in employment." Here, the majority rejected the defendant's claim that the statute requires a mutual understanding that the plaintiff agreeing to the fee-sharing proposal was a condition to his continued employment. Based on the common understanding of the term "understanding," the majority held that § 31-73 permits either "a mutual understanding between the employer and the employee or a unilateral understanding on the part of the employer." As to the term "representation," the majority relies on the "directly or indirectly" language to conclude that the statute is not limited to only explicit threats by an employer. Instead, where an employer harbors a unilateral understanding "and acts on that understanding by discharging the employee for his refusal, which conduct is in violation of the statute, regardless of whether the understanding was communicated to the employee."

Having interpreted the statute as it did, the majority had little trouble concluding that Mr. Dunn's evidence was sufficient to overcome the defendant's summary judgment motion. For the dissent (Justice Mullins for himself and Chief Justice Robinson), the statute simply did not apply, "because any request or demand for future FAA examination fees concerned unrealized funds from a proposed future business venture between the parties." In addition, Justice Mullins notes that the real issue is "whether the employer leveraged employment [either prospective or continued] to exact a sum of money. That did not happen under the facts of this case."

All in all, *Dunn* best represents yet another case involving the nuances and varied meanings of language, with nary a ball or strike in sight. ■

■ Any views expressed herein are the personal views of the author.

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