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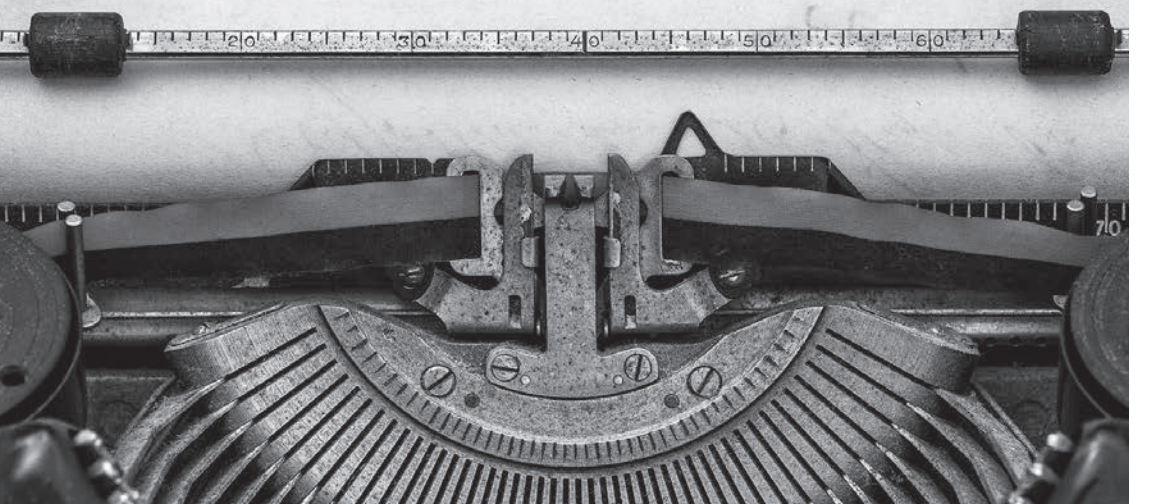

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PLEASE DIRECT CORRESPONDENCE TO:

Letters to the Editor, Inquiries about manuscripts, editorial matter, reprints, etc.: Sarah E. Murray, Editor-In-Chief,
55 Greens Farm Rd, Westport, CT 06880, (203)222-4949,
smurray@broderorland.com

Advertising: Natalie Jackson, Administrative Assistant
(860)612-2035, advertise@ctbar.org

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2016 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

BY JEFFREY A. COOPER,* JOHN R. IVIMEY,** AND KATHERINE E. COLEMAN***

This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. Part I discusses 2016 legislative developments. Part II surveys selected 2016 case law relevant to the field.

I. LEGISLATION[1]

A. *Probate Court Operations*[2]

Public Act 16-7 makes numerous modifications and technical corrections to statutes governing probate court operations. Included among these changes, the Act does the following:

> 1. Creates a process for a court lacking jurisdiction over a petition, application or motion to transfer that matter (without the imposition of an additional filing fee) to another probate court that does have jurisdiction.[3]
>
> 2. Expands the list of probate matters requiring a $225 filing fee to include petitions relating to the following: (i) placement of a child for adoption outside the state; (ii) examination of a cooperative postadop-

* Carmen Tortora Professor of Law and Associate Dean for Research and Faculty Development, Quinnipiac University School of Law, and of the Greenwich Bar.

** Of the Hartford Bar.

*** Of the Hartford Bar. The authors would like to thank Frank Berall, Scott Rosenberg and Hon. Beverly Streit-Kefalas for their helpful comments.

1 While this article briefly summarizes a few notable legislative developments, readers should note that the Probate Court Administrator's office has compiled a more comprehensive summary of 2016 probate legislation, available at http://www.ctprobate.gov/Documents/2016%20Legislative%20Summary.pdf. That document summarizes a number of statutes not discussed in this article.

2 An Act Concerning Probate Court Operations. P.A. 16-7 (Reg. Sess.) generally effective October 1, 2016.

3 P.A. 16-7 § 1.

tion agreement; (iii) contact between an adopted child and his or her biological siblings; (iv) termination of voluntary services provided by the Department of Children and Families; (v) custodianship under the Uniform Transfers to Minors Act; (vi) whether a person under a conservatorship is capable of giving informed consent for voluntary admission to a psychiatric facility; (vii) whether a person under a conservatorship or guardianship is competent to vote; (viii) request of the Commissioner of Social Services to enter an elderly person's premises to evaluate the need for protective services; and (ix) excusing a periodic or final account of a conservator or the final account of a trustee.[4]

3. Provides that a petition to remove a parent as guardian or terminate parental rights may be filed in the district in which the child resides, is domiciled or is currently located.[5] Prior law only permitted filing in the court where the child resided.

4. Expands the types of entities that may act as conservator to include limited liability companies and partnerships in addition to corporations.[6]

B. *Revisions to the Connecticut Uniform Power of Attorney Act*[7]

As summarized in last year's article, Public Act 15-240, The Connecticut Uniform Power of Attorney Act, made significant changes to Connecticut law and established a new statutory power of attorney.[8] Public Act 16-40 act made some relatively minor changes to this Uniform Power of Attorney Act, postponed its effective date from July 1, 2016

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4 P.A. 16-7 § 4.
5 P.A. 16-7 §§ 6-7.
6 P.A. 16-7 § 8.
7 An Act Concerning Revisions to the Connecticut Uniform Power of Attorney Act. P.A. 16-40 (Reg. Sess.), effective October 1, 2016.
8 An Act Concerning Adoption of the Connecticut Uniform Power of Attorney Act. P.A. 15-240 (Reg. Sess.), effective July 1, 2016. See Jeffrey A. Cooper & John R. Ivimey, *2015 Developments in Connecticut Estate and Probate Law*, 90 CONN. B.J. 310-313 (2016) (discussing legislation).

to October 1, 2016, and created a new statutory "short form" for creating a power of attorney.[9]

Like the prior "long form," the new short form lists powers that a principal can grant an agent and requires the principal to strike out and initial any power(s) that the principal does not wish to grant to the agent.[10] Unlike the long form, the short form does not contain optional provisions that can be used to authorize additional powers, such as managing inter vivos trusts, gifts, rights of survivorship, and beneficiary designations, authorizing another person to exercise authority under the POA, waiving the right to be a beneficiary of a joint and survivor annuity, exercising fiduciary powers, and disclaiming or refusing an interest in property.[11]

C. *The Sale of Privately Held Alcoholic Liquor for Auction*[12]

Public Act 16-56 creates a mechanism for decedent's estates to transfer alcoholic liquor, such as wine, beer or spirits, without complying with the requirements of the Liquor Control Act.[13] Specifically, an estate's fiduciary may sell or transfer alcoholic liquor without a liquor permit if the purpose of the sale or transfer is to have a licensed auctioneer auction off the alcoholic liquor and both the probate court and the Commissioner of Consumer Protection, or his designee, have approved the transaction in writing.[14]

D. *Probate Fee Lien*[15]

Public Act 16-65 clarifies that the probate fee lien[16] applies only to estates of those dying on or after January 1,

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9 P.A. 16-40 § 3. The act specifically provides that it does not prohibit the use of other power of attorney forms. *Id*.

10 P.A. 16-40 § 3.

11 P.A. 16-40 § 3.

12 An Act Permitting the sale of Privately Held Alcoholic Liquor for Auction. P.A. 16-56 (Reg. Sess.), effective July 1, 2016.

13 P.A. 16-56.

14 P.A. 16-56.

15 An Act Concerning Banking and Consumer Protections. P.A. 16-65 (Reg. Sess.), effective July 1, 2016.

16 P.A. 15-5, § 454 (June Special Sess.) provides for "a lien in favor of the state of Connecticut upon any real property located in this state that is included in the basis for [probate] fees of the estate of a deceased person."

2015, and exempts a "bona fide purchaser" and "qualified encumbrancer" from that lien.[17] This is a very narrow exception, however, insofar as it defines a "bona fide purchaser" as one who purchases property in good faith and without actual, implied or constructive notice that the seller died owning the property or had transferred the property to the trustee of an intervivos trust who owned the property when the transferor died.[18] Similarly, a "qualified encumbrancer" is one who places a burden, charge or lien on property without actual, implied or constructive notice of the seller's death or transfer to an intervivos trust as described above.[19] As a practical matter, these exceptions will rarely apply since notices filed on the land records and other circumstances surrounding the transaction typically will provide constructive or inquiry notice of the property owner's death.

E. *Fiduciary Access to Digital Assets*[20]

Public Act 16-145 authorizes specified fiduciaries (executors or administrators of estates, conservators of the person, agents under powers of attorney, and trustees) to take control of a represented person's digital assets, including emails, social media accounts, digital files, and virtual currency.[21] In order to exercise this authority, a fiduciary must send a written request to the asset's custodian together with a certified copy of the document appointing the fiduciary.[22] The fiduciary also must provide certain other information the custodian requests, such as account verification.[23] Upon receipt of the required materials, a custodian of a digital asset must generally comply within 60 days.[24]

The above provisions do not apply where they would be contrary to the established intent of the user of the digital

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17 P.A. 15-5 § 64.
18 P.A. 15-5 § 64.
19 P.A. 15-5 § 64.
20 An Act Concerning The Connecticut Revised Uniform Fiduciary Access to Digital Assets Act. P.A. 16-145 (Reg. Sess.), effective October 1, 2016.
21 P.A. 16-145.
22 P.A. 16-145 §§ 7-14.
23 P.A. 16-145 §§ 7-14.
24 P.A. 16-145 § 16.

asset and the act creates a method for determining this intent.[25] First, if the custodian of a digital asset had an online tool allowing an account user to authorize or prohibit access to digital assets to a fiduciary, that online direction governs.[26] Second, if the custodian did not provide an online tool, or if the user does not use the one provided, then the user may allow or prohibit disclosure to a fiduciary in a will, trust, power of attorney, or other record.[27] In the absence of either such direction, the general provisions of the Act apply.[28]

The Act does not apply to an employer's digital assets used by employees in the ordinary course of business.[29]

F. *Expanded Disinheriting of Persons Convicted of Crimes*[30]

Public Act 16-168 extends the scope of Connecticut's existing "slayer statute," which prohibits persons found guilty of certain crimes from inheriting or receiving part of the victim's estate. The statute now covers persons found not guilty of such crimes by reason of mental disease or defect, as well as to those convicted of second degree manslaughter and second degree manslaughter with a firearm.[31] The prior law applied to the following crimes: murder, murder with special circumstances, felony murder, arson murder, first degree manslaughter, first or second degree larceny, and first degree abuse of an elderly, blind or disabled person or person with intellectual disability.[32] Prior law further permitted someone convicted of first or second degree larceny or first degree abuse to petition the court to override these prohibitions.[33] The new Act extends this petitioning ability to defendants found not guilty by

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25 P.A. 16-145 § 4.
26 P.A. 16-145 § 4.
27 P.A. 16-145 § 4.
28 P.A. 16-145 § 4.
29 P.A. 16-145 § 3.
30 An Act Concerning the Inheritance Rights of a Beneficiary or Survivor Who is Found Not Guilty of Murder or Manslaughter by Reason of Mental Disease or Defect. P.A. 16-168 (Reg. Sess.), effective October 1, 2016.
31 P.A. 16-168 §1.
32 CONN. GEN. STAT. § 45a-447.
33 CONN. GEN. STAT. § 45a-447.

reason of mental disease or defect.[34] The court may grant the petition if it would fulfill the deceased victim's intent or avoid a grossly inequitable outcome under the circumstances.[35]

G. *Validity of Conveyances to Trust Rather than a Trustee*[36]

Public Act 16-194 in part eliminates a trap for the unwary by validating a conveyances of real estate made to a trust itself rather than to a trustee.[37] Also, the Act provides that a conveyance by the trust which is signed by a duly authorized trustee will be treated as if it had been made by the trustee.[38]

H. *Probate Fees Capped at $40,000*[39]

Public Act 16-3 establishes a $40,000 maximum probate fee for the settlement of an estate.[40] As a practical matter, this maximum fee will apply to estates valued at or above $8.877 million.[41] Under the prior law, an estate of this size would have paid the same probate fee but even larger estates would have paid an incremental fee at a 0.5% marginal rate, with no cap.[42]

II. Case Law

A. *Conservatorships and Guardianships*

1. Qualifications of Conservator

In *DeNunzio v. DeNunzio*,[43] the Supreme Court clarified the effect of the major 2007 revision of Connecticut's conservatorship statutes and made clear that the probate court

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34 P.A. 16-168. § 1.
35 P.A. 16-168. § 1.
36 An Act Concerning Revisions to Statutes Affecting Title to Real Property. P.A. 16-194 (Reg. Sess.), effective October 1, 2016.
37 P.A. 16-194 § 6.
38 P.A. 16-194 § 6.
39 An Act Concerning Revenue and Other Items to Implement the Budget for the Biennium Ending June 30, 2017. P.A. 16-3 (May 2016 Special Sess.), effective for estates of decedents dying on or after July 1, 2016.
40 P.A. 16-3 § 193.
41 P.A. 16-3 § 193.
42 *See* Conn. Gen. Stat. § 45a-107 (2015).
43 320 Conn. 178 (2016).

must rigorously follow applicable statutes in appointing and selecting a conservator.

The named parties in the case were a mother and father who had each petitioned to be appointed conservator of their adult child.[44] The superior court appointed the father as conservator, finding in part that his appointment was in the "best interests" of the son.[45] The mother appealed this appointment all the way to the Supreme Court, contending in part that the probate court had wrongly considered the child's "best interests" in selecting the conservator rather than rigorously applying the statutory requirements set out in General Statutes Section 45a-650(h).[46]

The Supreme Court agreed that P.A. 07-116 (codified at General Statutes Section 45a-650(h)) completely supplanted the prior "best interests" standard for evaluating a proposed conservator and replaced it with five specific factors a court must consider.[47] Observing that "the legislature deleted every reference to 'best interests' in § 45a-650," the Court concluded that "legislature intended to remove [best interests] from consideration."[48] However, the Court further concluded that the Probate court's error in considering the child's best interests in the case at bar was harmless because the court "ultimately, but imperfectly, predicated its decision on the statutory factors" set forth in § 45a-

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[44] *Id*. at 182.

[45] *Id*. at 185.

[46] *Id*. at 187.

[47] *Id*. at 194-96. General Statutes § 45a-650(h) provides in relevant part as follows: "In considering whom to appoint as conservator or successor conservator, the court shall consider (1) the extent to which a proposed conservator has knowledge of the respondent's or conserved person's preferences regarding the care of his or her person or the management of his or her affairs, (2) the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator, (3) the cost of the proposed conservatorship to the estate of the respondent or conserved person, (4) the proposed conservator's commitment to promoting the respondent's or conserved person's welfare and independence, and (5) any existing or potential conflicts of interest of the proposed conservator."

[48] 320 Conn. at 194. The Court went on to make clear that the legislative changes precluded consideration of "best interests" as that factor had previously been applied in probate cases – a "paternalistic" approach which "effectively equates adults who are respondents in conservation [sic] proceedings with minors." *Id*. at 195. The Court expressed its hope that application of the statutory framework would advance a conserved person's best interests "as that term is *commonly* understood." *Id*. (emphasis in original).

650(h).[49]

Despite concluding that the probate court's consideration of bests interests constituted harmless error, the Court noted several deficiencies in the record and opined that "it clearly would be the better practice" for the record to more clearly set out the judge's analysis of each of the five statutory factors.[50] Under different circumstances, the Court warned, a probate court's failure to do so could constitute reversible error.[51] Attorneys for proposed conservators can help to avoid this pitfall by urging a probate court evaluating a petition for conservatorship to make a detailed analysis, on the record, of the factors set out in General Statutes Section 45a-650(h).

2. Appointment of Attorney

In *Berry v. Skyview Center*,[52] the superior court considered several issues relating to the appointment of a conservator. Unfortunately, the court's opinion fails to fully resolve one of the most crucial issues raised on appeal.

The case concerned a woman living in a nursing home.[53] For unexplained reasons, she refused to apply for Title XIX benefits, leaving herself without the means to pay for her care.[54] The nursing home filed for appointment of an involuntary conservator of her estate, hoping that the conservator would pursue an application for public assistance.[55] After notice and a hearing, the probate court appointed a conservator of her estate and person.[56]

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[49] *Id*. at 196.

[50] *Id*. at 196-99. As the Court readily conceded, "there is no rule of practice or statute expressly requiring the Probate Court to make specific findings relating to the court's consideration of each of the statutory factors." *Id*.

[51] *Id*. at 198-99 (citing Falvey v. Zurolo, 130 Conn. App. 243, 255 (2011)). For a more detailed discussion, see Jeffrey A. Cooper & John R. Ivimey, *2014 Developments in Connecticut Estate and Probate Law*, 89 CONN. B.J. 80, 95-96 (2015) (discussing prior cases in which courts have considered setting aside the appointment of a conservator on these grounds). *See also* Papa v. Hoffman, No. CV156008077S, 2016 WL 1710310 *1, *3 (Conn. Super. Ct. Apr. 6, 2016) (finding that probate court record reflected adequate consideration of statutory factors).

[52] No. NNHCV155035480S, 2016 WL 1444201 (Conn. Super. Ct. Mar. 23, 2016).

[53] *Id*. at *1.

[54] *Id*.

[55] *Id*.

[56] *Id*.

The conserved person appealed on numerous grounds addressed by the superior court. First, she alleged that the probate court erred in appointing a conservator of both the estate and person when notice of the hearing only referred to a petition for appointment of a conservator of the estate.[57] The superior court agreed with this objection and vacated the appointment of a conservator of the person.[58] Second, she alleged that the medical evidence supporting the petition was insufficient, in part because the physician providing that medical evidence failed to check a box on the probate form indicating whether or not he found the respondent to have impaired capacity to make decisions.[59] The superior court denied this technical objection, finding that the probate court had carefully questioned the doctor in court, thus curing any technical defects in his written report.[60] Third, she objected that the probate court erred by denying her petition to remove and replace her court-appointed attorney.[61] The superior court dismissed this objection as well, in part because the subsequent replacement of that attorney rendered the objection moot.[62]

On this last point, we would have liked to see some additional analysis.[63] Although it noted in a footnote that Section 45a-649a seems to grant a respondent the right to choose her own attorney "as a matter of right," the court found no need to explore that issue since the counsel had subsequently been replaced and thus the superior court could offer "no practical relief."[64] Under the facts of the case, the superior court was correct in finding the issue moot. Nevertheless, since court-appointed attorneys often represent respondents in conservatorship proceedings, a future court may need to engage in more detailed analysis of the court's obligation when a conserved person requests a change of attorney.

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57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*

3. Fees

In *Venezia v. Venezia*,[65] the Superior Court determined that a temporary conservator that was improperly appointed was not entitled to receive any fees from the person wrongly conserved.

The defendant had successfully petitioned to be appointed the plaintiff's temporary conservator.[66] Thereafter, the probate court vacated that appointment after finding that it had been based on improper medical evidence and made with inadequate notice.[67] Despite vacating the defendant's appointment as temporary conservator, the court ordered the plaintiff to pay half of the conservator's fees for services performed from the date of appointment until the date the appointment was vacated.[68] The plaintiff objected and an appeal ensued.[69]

The superior court reversed, holding simply that "[s]ince there was no legal basis for the appointment, the court cannot find any legal authority for an award of fees."[70]

On one level, the superior court's ruling is perfectly logical. Yet, it is unclear how it would apply under different facts. For example, had the temporary conservator been a third party rather than the petitioner in the underlying action, and thus not directly responsible for any procedural defects in the conservatorship petition, it would seem unjust to deny a fee for services performed.

B. *Procedure*

1. Misjoinder

In *Bobo v. Jack Family Trust*,[71] the superior court held that the naming of a trust, rather than its trustee, as a party in litigation is a curable defect that does not deprive the court of jurisdiction.

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65 No. LLICV145007487S, 2016 WL 4150100 (Conn. Super. Ct. June 29, 2016).
66 *Id.* at *1.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at *2.
71 No. HHDCV156058346S, 2016 WL 2602682 (Conn. Super. Ct. April 15, 2016).

It is well established law that a trust is not a legal entity that can be sued; the trustee, rather than the trust itself, thus is the proper party to any litigation.[72] In this case, the plaintiff brought a tort action against the trust itself, an error which led the trust to file a motion to dismiss for lack of subject matter jurisdiction.[73] The court characterized the defects in the plaintiff's pleadings as the misjoinder of the trust as a party and the nonjoinder of the trustee, defects which should be challenged by a motion to strike rather than a motion to dismiss.[74] Accordingly, the court denied the motion to dismiss.[75]

The case may at first seem to be of little significance given that the improper naming of the trust as a party could be easily cured in this case. Nevertheless, the plaintiff's failure to properly name the trustee as a party is an error that practitioners, particularly those who do not often bring lawsuits involving trusts, commonly make and would be well-served to avoid.

2. Service of Process

In *Dahl v. Conner*,[76] the superior court addressed the question of whether General Statutes Sections 52-60 and 52-61, which provide for service of process on the probate judge,[77] are the exclusive means of serving process on a

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[72] *Id.* at *1 (citing Randolph Foundation v. Appeal from Probate Court of Westport, No. X05CV980167903 (Conn. Super. Ct. Apr. 3, 2001)).

[73] *Id.* at *1.

[74] *Id.* at *2. In addition, the court noted that these defects can be cured by timely substituting the appropriate parties.

[75] *Id.*

[76] No. CV166059347S, 2016 WL 3266393 (Conn. Super. Ct. May 25, 2016).

[77] General Statutes § 52-60 provides in relevant part as follows:

(a) No appointment of a nonresident of this state as an executor, administrator, conservator, guardian or trustee may take effect until the person so appointed has filed in the court of probate making the appointment a certificate … appointing the judge of the court of probate and the judge's successors in office to be his attorney upon whom all process in any action or proceeding described in section 52-61 and in any garnishment of the estate in the possession of the executor, administrator, conservator, guardian or trustee may be served.

(b) Such person shall agree in the certificate that any such process which is served on the judge of probate shall be of the same force and validity as if served on himself … and that the appointment of the judge of probate to be his attorney shall continue in force as long as any liability remains outstanding against him as a fiduciary and as long as he has any estate in his possession as a fiduciary.

General Statutes § 52-61 provides in relevant part as follows:

nonresident fiduciary or whether service can be made on the Secretary of the State as statutory agent pursuant to General Statutes Section 52-59b.[78]

In this case, the plaintiff brought a cause of action against a nonresident fiduciary by serving process on the Secretary of the State as provided in General Statutes Section 52-59b.[79] The defendant fiduciary moved to dismiss, contending that General Statutes Section 52-60 and General Statutes Section 52-61, which mandate service upon the probate judge, provide the exclusive means to serve a nonresident fiduciary and thus service pursuant to General Statutes Section 52-59b was invalid.[80]

The superior court reasoned that General Statutes Section 52-59b is an available means for service of process upon any individual who "conducts business" in Connecticut.[81] Accordingly, the key inquiry before the court was whether the fiduciary in this case could be characterized as conducting business in this state.[82] After a subsequent hearing on the merits, the court determined that the fiduciary in question did not engage in conduct which rose

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Process in civil actions against a nonresident executor, administrator, conservator, guardian or trustee, in his representative capacity, or in his individual capacity in any action founded upon or arising from his acts or omissions as such executor, administrator, conservator, guardian or trustee, may be served by leaving a true and attested copy thereof with the judge of probate ….

78 General Statutes § 52-61 provides in relevant part as follows:

(a) …[A] court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent: (1) Transacts any business within the state ….

(c) Any nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, may be served upon the Secretary of the State….

79 *Dahl* at *1.

80 *Id.* At oral argument, the defendant conceded that §§ 52-60 and 52-61 might not be the exclusive means to serve a nonresident fiduciary in every case, but that they were so under the facts of this case. *Id.*

81 *Id.* (citing CONN. GEN. STAT. § 52-59(a)).

82 *Dahl* at *1.

to the level of "conducting business" in Connecticut and thus service pursuant to General Statutes Section 52-59b was improper.[83]

While the court may have held differently under different circumstances, the uncertainty is one practitioners can and should avoid. General Statutes Section 52-60 and 52-61 provide a clear mechanism for service of process on a nonresident fiduciary and practitioners seeking to bring an action again a nonresident fiduciary would be well-advised to treat those statutes as the exclusive means of doing so.

3. Timeliness of Appeal

In *Connery v. Gieske*,[84] the Supreme Court addressed the question of when a party can timely bring an appeal of a probate court decree that is initially issued orally in open court and thereafter reduced to writing. The court's analysis resolves the case at bar but leaves several lingering questions.

As we discussed in an earlier update, the underlying facts involve a contested estate administration.[85] The probate judge issued a number of orders in open court but did not mail a written version of those orders until over two years later.[86] The plaintiff appealed the oral order some 40 days after it was issued (which was still two years before the court issued a written version).[87] The defendant moved to dismiss that appeal as untimely, contending that the oral order began the timeline for an appeal which needed to be brought within 30 days thereafter.[88] The superior court agreed with that argu-

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[83] *Dahl v. Connor*, No. CV166059347S, 2016 WL 4497674 (Conn. Super. Ct. July 21, 2016).

[84] 323 Conn. 377 (2016).

[85] *See* Jeffrey A. Cooper and John R. Ivimey, *2013 Developments in Connecticut Estate and Probate Law*, 88 CONN B.J. 51, 59-61 (2014) (discussing superior court treatment of the case).

[86] 323 Conn. 377 (2016) at *3 (WESTLAW pagination. Official pagination not yet available.).

[87] *Id.*

[88] *Id.* at *3, citing General Statutes § 45a-186, which provides in relevant part as follows:

Except as provided in sections 45a-187 and 45a-188, any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive, and not later than thirty days after mailing of an order, denial or decree for any other matter in a Probate Court, appeal therefrom to the Superior Court.

ment and dismissed the appeal, holding that the order issued in open court provided sufficient notice of the court's decision to begin the running of the appeals period.[89]

The Supreme Court affirmed but on very different grounds. Rather than finding the appeal to have been filed too late, as did the trial court, the Court held that it had been filed "too soon."[90] In reaching this result, the Court placed great emphasis on the fact that General Statutes Section 45a-186 requires that an appealing party attach to her complaint, "[a] copy of the order, denial or decree appealed from."[91] The Court reasoned that this requirement could not be met until after the probate court reduced its order to writing and thus the plaintiff acted "too soon" when she tried to commence an appeal prior to that time.[92]

In reaching this conclusion, the Court acknowledged that the relevant statutory scheme has not always been a model of clarity. For example, the Court conceded that when the legislature revised General Statutes Section 45a-186 in 2007, it left in place conflicting statutory provisions that suggested an appeals period began when a party had "notice" of an order and which did not require an appellant to attach to his appeal a copy of the order appealed from.[93] Legislation in 2011 resolved that confusion.[94] Additionally, prior to the 2013 adoption of the Probate Court Rules, there was no clear authority requiring that all probate court orders be issued in writing.[95] While the trial court felt that the unclear statutory framework justified its focus on the plaintiff's actual notice of the adverse order,[96] the Supreme Court stuck with the "plain language" of General Statutes Section 45a-186 and its requirement that a copy of the probate court's written order be attached to an appeal.[97]

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89 *Id.* at *3.
90 *Id.* at *4.
91 *Id.* at *5 (quoting CONN. GEN. STAT. § 45a-186).
92 *Id.* at *6.
93 *Id.* at *7.
94 *Id.*
95 *Id.*
96 *Id.* at *4.
97 *Id.* at *7.

It is worth noting that in the case at bar, the plaintiff had timely filed a second appeal after receiving the written order and thus had a viable alternative means of pursuing the appeal in this case.[98] Ironically, thus, the Court's holding will have little impact on the actual parties before it. We see the potential for far greater significance in innumerable other cases where other probate courts presumably issued orders orally but never reduced those orders to writing.[99] The Court's holding in this case would seem to provide an avenue for parties to reopen those other cases long considered closed by petitioning the probate court to issue written versions of their prior oral orders and then bringing timely appeals therefrom.

In addition, assuming the Court correctly interpreted the applicable statutes, the General Assembly might need to further clarify the language of Section 45a-186, which provides that an appeal may be brought "not later" than thirty days after the probate court mails its written order. On its face, that language creates a deadline without any clear starting point – an appeal filed *before* the mailing of an order is technically filed "not later" than thirty days after the mailing of that order. If the legislature wishes to validate the Court's reading of Section 45a-186, it would replace the phrase "*not later than* thirty days after mailing" with "*within* thirty days after mailing."

4. Election of Jury Trial

In *Cassem v. TIAA-CREF*[100] the superior court held that the 60 day period for asserting a right to a jury trial on certain probate court matters runs from the date of the filing of the affidavit of intent to claim a jury trial rather than the date of the resulting probate court order.

This case involved a dispute over the ownership of a decedent's retirement account and the interpretation of the

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[98] *Id.* at *1.

[99] As the Court observed, prior to enactment of the Probate Court Rules of Procedure in 2013, probate judges arguably were not required to reduce their orders to writing.

[100] No. HHDCV166065339S, 2016 WL 6128123 (Conn. Super. Ct. Sept. 21, 2016).

Connecticut statute[101] allowing a party sixty days to seek a jury trial in the superior court instead of having the matter proceed in probate court.[102] The plaintiff, the decedent's sister-in-law, filed in the probate court an affidavit of intent to seek a jury trial in the superior court.[103] She filed her superior court action 72 days after the filing of that affidavit, which was only 56 days after the probate court issued an order deferring the estate settlement proceedings for a 60 day period to allow plaintiff to file her action.[104] The purported beneficiary of the account moved to strike the complaint, arguing that it was not timely filed since the applicable 60-day timeframe ran from the date of plaintiff's filing the affidavit in probate court.[105]

The Court looked to the language of the statute and legislative history and found both to support the reading that the 60 day period runs from the date of the filing of the affidavit of intent in the probate court.[106] Since the plaintiff brought her superior court action after this time had expired, she was deemed to have consented to the jurisdiction of the probate court and waived her right to a jury trial.[107]

It is fair to say that the statute could have been drafted more clearly.

5. Substitution of Parties

In *Hodkin v. Millan*,[108] the superior court granted a

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[101] CONN. GEN. STAT. § 45a-98a which provides in part as follows: "Before the initial hearing on the merits of such a matter, any interested person may file an affidavit that such person is entitled and intends under section 52-215 to claim a trial of the matter by jury. In that case, the Probate Court shall allow the person filing the affidavit a period of sixty days within which to bring an appropriate civil action in the Superior Court to resolve the matter in dispute.;" and "If a party fails to file an affidavit of intent to claim a jury trial prior to the initial hearing in the Probate Court on the merits, or having filed such an affidavit, fails to bring an action in the Superior Court within the sixty-day period allowed by the Probate Court, the party shall be deemed to have consented to a hearing on the matter in the Probate Court and to have waived any right under section 52-215 or other applicable law to a trial by jury."

[102] *Cassem* at *1.

[103] *Id*.

[104] *Id*.

[105] *Id*. at *2.

[106] *Id*. at *2-4.

[107] *Id*. at *4.

[108] No. CV155039805S, 2016 WL 1099191 (Conn. Super. Ct. Feb. 19, 2016).

motion to dismiss a cause of action brought against the administrator of the estate because the administrator had resigned and the plaintiff had not properly substituted his successor as a party in the case.

The underlying case was brought by the decedent's former husband against the decedent's father as administrator of her estate.[109] The plaintiff's lawsuit contained nine counts, including that the administrator had failed to honor the terms of the decedent's marital settlement agreement with the plaintiff and that he had engaged in statutory theft and conversion.[110] While the action was pending, the defendant resigned as administrator and was replaced by a successor.[111] He then moved to dismiss the action against him, claiming it was moot.[112]

The superior court granted the motion to dismiss.[113] The court held that since the action was brought against the administrator solely in his representative capacity, the plaintiff was obligated to substitute the new administrator as a party if he "intended to continue to prosecute this action," after the administrator's resignation.[114] As a result of his failure to do so, the court granted the defendant's motion to dismiss.[115]

In reaching this result, the court cited General Statutes Section 45a-242, which provides in relevant part that upon replacement of a fiduciary, "[a]ll suits in favor of or against the original fiduciary shall survive to and may be prosecuted by or against the person appointed to succeed such fiduciary."[116] The court held that that this provision does not operate automatically but must be effectuated by the filing of a motion to substitute a party.[117] The court also refused to allow the tort-like claims of statutory theft and conver-

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109 *Id.* at *1.
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at *2.

sion to survive against the defendant personally because the case against him had been brought solely in his representative capacity.[118]

While the court's holding seems straightforward, we think there may be a bit more to the analysis. Specifically, we would have liked to see a discussion of General Statutes Section 45a-242(e) which provides that upon the replacement of a fiduciary, "all suits in favor of or against the original fiduciary shall survive to and may be prosecuted by or against the person appointed to succeed such fiduciary" and does not explicitly provide a requirement that the plaintiff file a motion to substitute the new administrator or a deadline for so doing.[119]

Despite this unclear statutory regime, the plaintiff seemingly could have taking simple steps to avoid the harsh result in this case, and practitioners should consider the case a warning that seemingly minor procedural defects can have significant consequences.[120]

C. *Wills and Trusts*

1. Testamentary Capacity

In *Bassford v. Bassford*,[121] the superior court undertook a detailed analysis of the testamentary capacity required to execute a will. Although the court's analysis was fact-intensive, it provides useful guidance on the applicable legal standards and best practices for attorneys supervising will executions.

In 2006, the testator had executed a will which named his three children as primary beneficiaries.[122] Thereafter,

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[118] *Id.*

[119] Conn. Gen. Stat. § 45a-242 (e).

[120] For example, the plaintiff could have named the defendant individually as a party in the initial lawsuit, added him as a party thereafter, and/or moved to substitute the new administrator as a party. Case law suggests that the motion to substitute could have been brought even after the defendant filed his motion to dismiss. *See* Schoolhouse Corp. v. Wood, 43 Conn. App. 586, 590 (1996)(stating that a party "could have filed a timely motion to substitute in the Superior Court when it filed its objection to the motions to dismiss.").

[121] No. MMXCV156012903S, 2016 WL 1552888 (Conn. Super. Ct. Mar. 24, 2016).

[122] *Id*. at *1.

he suffered from a variety of medical ailments, including post-traumatic stress disorder, progressive dementia and addiction to an anti-anxiety medication known to cause impaired cognitive function.[123] As a result of these issues, in 2011, the testator's wife had successfully petitioned to be appointed his conservator.[124] Months later, in spring 2012, the testator executed a new will, naming his spouse as primary beneficiary, leaving only some personal property to two of his children and a token one dollar bequest to the third.[125] When the decedent died in 2014, the probate court admitted the 2012 will to probate, finding that the testator had sufficient mental capacity to execute the will.[126]

The superior court began its analysis by setting out the established law: that the proponent of a will has the burden of proving testamentary capacity by showing that the testator "had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will…."[127] The court further clarified that this test is to be applied "at the very time when [the testator] executed the instrument."[128] As a result, evidence about the decedent's mental state at points prior or subsequent thereto "diminishes in weight as the time lengthens in each direction from that point."[129]

In applying this statutory framework to the facts of the case, the court accorded great weight to the testimony of a psychiatrist who evaluated the decedent less than two weeks before the will execution and found him to meet the statutory test for capacity.[130] The court also accorded significant weight to the testimony of the drafting attorney, who questioned the decedent extensively just prior to the will execution and was similarly satisfied that he possessed testamentary capacity at that time.[131] The court accorded

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123 *Id.* at *3.
124 *Id.* at *4.
125 *Id.* at *5.
126 *Id.* at *1.
127 *Id.* at *3 (quoting In re City Nat. Bank & Trust Co. of Danbury, 145 Conn. 518, 521 (1958)).
128 *Id.* (quoting Jackson v. Waller, 126 Conn. 294, 301 (1940)).
129 *Id.* (quoting Jackson v. Waller, 126 Conn. 294, 301 (1940)).
130 *Id.* at *5.
131 *Id.*

significantly less weight to the testimony of a psychiatrist hired by the challengers, in part due to "his lack of opportunity to personally observe" the testator.[132]

The case stands for two points relevant to members of the bar. First, it serves as a reminder that the test for testamentary capacity is quite low and even one suffering from significant mental impairments at certain times can validly execute a will during a lucid interval. Second, proper preparation by the drafting attorney, including detailed inquiry and evaluation of the testator's mental capacity, as well as securing the evaluation of a trained mental health professional as appropriate, can help insulate a will from subsequent challenges.

2. Construction: General Rules

In *Heisinger v. Dillon*,[133] the Appellate Court held that when interpreting the language of a will, a court should apply default rules of construction as they existed at the time the document was drafted.

The issue in the case was the proper interpretation of a provision of 1950 will admitted to probate in 1991 and causing controversy in 2007.[134] The plaintiff argued that the will should be interpreted in accordance with modern conventions, as reflected in the *Restatement (Third) of Trusts* and the *Restatement (Third) of Property*.[135] The defendant countered that the *Restatement (Second) of Trusts* and the *Restatement (First) of Property* provided the relevant guidance for determining the testator's intent, since they "were in existence closer to the time his will was drafted."[136] The superior court granted summary judgment for the defendant, and the Appellate Court affirmed.[137]

The Appellate Court reasoned as a general matter that since a drafting attorney is deemed to know default rules of construction "in existence at the time the will was drafted,"

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[132] *Id*. at *6.
[133] 168 Conn. App. 467 (2016).
[134] *Id*. at 469.
[135] *Id*. at 476.
[136] *Id*. at 469-70.
[137] *Id*. at 476.

the words of a document may be interpreted in light of "the default rule of construction in existence at the time" a document was created.[138] Conversely, since a drafting attorney is not responsible for predicting future rules of construction, those future rules should not be used to interpret the meaning of the words chosen.[139] In the case at bar, this meant the language of the 1950 Will was properly construed in accordance with the guidance provided by the *Restatement (Second) of Trusts*, which was promulgated closer in time to the drafting of the will, rather than the newer *Restatement (Third)*.[140]

While on one level the case seems unremarkable, it may represent a subtle shift in the Court's approach to will construction matters. Specifically, the Court's reasoning seemingly conflicts with that evidenced in the prior case of *Ruotolo v. Tietjen*,[141] in which the Appellate Court interpreted the language of a 1990 will in part by reference to statutes and authorities which did not exist at the time of the document's execution.

D. *Estate Settlement*

1. Equitable Conversion

In *Southport Congregational Church v. Hadley*,[142] the Supreme Court considered the doctrine of equitable conversion, deciding whether decedent's real property which was subject to a sales contract entered into prior to the decedent's death should pass under the terms of his will or pursuant to an intervivos charitable pledge.[143]

Prior to his death, the decedent executed a last will specifically devising real property to a church. After execut-

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138 *Id*. at 478-79 (citing Hartford Nat'l Bank & Trust Co. v. Birge, 159 Conn. 35, 43 (1970)).

139 *Id*. at 481 ("An attorney drafting a will cannot be expected to be familiar with default rules of construction published more than one-half of a century later.").

140 *Id*. at 479-80.

141 Ruotolo v. Tietjen, 93 Conn. App. 432 (2006), aff'd, 281 Conn. 483, 916 A.2d 1 (2007). For a critique of the court's approach in the case, see Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's AntiLapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 218 (2007).

142 320 Conn. 103 (2016).

143 *Id*. at 105.

ing the will, the decedent entered into a contract with a buyer to sell the real property and pledged the sale proceeds to a museum.[144] The decedent died nine days after signing the sales contract but prior to the expiration of its mortgage contingency period.[145]

The coexecutors of the decedent's estate argued that the decedent owned an interest in real property at the time of his death and thus sought, and received, probate court approval to sell the property.[146] The coexecutors filed a second action in the trial court seeking authorization to sell the property, which the trial court similarly granted.[147] The church appealed both actions to the Appellate Court, contending that the real property passed to it pursuant to the terms decedent's will and it opposed the proposed sale.[148] The museum intervened and countered that under the doctrine of equitable conversion the decedent's ownership interest was in the expected sales proceeds (which he had pledged to the museum) rather than the underlying real estate (which he had bequeathed to the church).[149] The Appellate Court held that equitable conversion did not apply since the mortgage contingency clause had not expired and remanded the case with direction to deny the coexecutors' application to sell the property.[150]

The Supreme Court overruled the Appellate Court's decision and held that the doctrine of equitable conversion should be applied.[151] The Court pointed to case law which holds that equitable conversion may apply when the seller's contractual duty arises at the time of execution, but is subject to a condition subsequent.[152] The Court parsed the language of the mortgage contingency clause to conclude that it was a condition subsequent because the parties intended

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144 *Id*. at 106-07.
145 *Id*. at 107.
146 *Id*. at 108-09. The probate court ruled that the coexecutors needed the consent of the church by way of an amended decree.
147 *Id*. at 109.
148 *Id*. at 109-110.
149 *Id*. at 109-110.
150 *Id*. at 110.
151 *Id*.
152 *Id*. at 114 (citing Connecticut, Maryland, and Texas case law).

the sale to proceed unless the buyer notified the decedent that she could not obtain financing within twenty-one days.[153] In reaching its conclusion, the Court also looked to the decedent's intent more broadly and found evidence that the decedent intended to redirect his bequest of the real property to the museum.[154] The Court's application of equitable conversion thus furthered the decedent's testamentary intent.

While the case provides a detailed analysis of the doctrine of equitable conversion and a framework for its application, its applicability is limited to the specific language of the sales contract and the facts of the case at bar. Future cases regarding equitable conversion will likely be just as fact-specific.

2. Ancillary Probate

In *Goodwin v. Colchester Probate Court*,[155] the Appellate Court construed the Connecticut statute that governs the admission of an out-of-state will to ancillary probate. Unfortunately, the Court's opinion does not clearly resolve a fundamental question underlying the case, namely whether a Connecticut probate court may conduct an independent inquiry into the validity of the will being submitted for ancillary probate or whether it must give full faith and credit to the decree of the other state's probate court which admitted the will to original probate.

The facts of the case concern a decedent whose holographic will was admitted to probate in Pennsylvania.[156] Three of the decedent's heirs at law were Connecticut residents; all received notice of the Pennsylvania proceedings yet declined to pursue an appeal of the decree admitting the

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[153] The Court found two phrases in the mortgage contingency clause to support this conclusion. First, the clause stated that if the buyer did not notify the decedent of her inability to find financing within twenty-one days, the contract would remain in effect. *Id*. at 116. The contract also stated that if the buyer notified the decedent that she could not obtain financing, the contract would be null and void. *Id*.

[154] *Id*. at 121-22.

[155] 162 Conn. App. 412 (2016). In our 2012 update, we discussed a prior proceeding in this case. John R. Ivimey & Jeffrey A. Cooper, *2012 Developments in Connecticut Estate and Probate Law*, 87 CONN. B.J. 134, 147-48 (2013).

[156] 162 Conn. App. at 416.

will to probate.[157] However, when the decedent's executor later filed a petition for ancillary probate in Connecticut, the Connecticut heirs objected and sought to relitigate the issue of the will's validity.[158] Citing General Statutes Section 45a-288, which provides in relevant part that a will admitted to probate in another state will be admitted for ancillary probate in Connecticut without a hearing unless there is "sufficient objection," the Connecticut heirs objected on the basis that the will did not comply with Connecticut's wills act and may have been a product of fraud or undue influence.[159] The probate court agreed that the will's validity was "questionable," holding that the heirs had raised a "sufficient objection" within the meaning of the statute.[160]

Rather than trying the matter in probate court, the executor appealed to the superior court.[161] After a trial, the superior court issued an oral opinion concluding that the allegations of undue influence were without merit and that the executor had complied with the procedural requirements imposed by General Statutes Section 45a-288; thus no "sufficient objection" had been made to the will's admission to probate.[162] A further appeal ensued.[163]

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[157] *Id*. Two parties did appeal the decree admitting the will to probate but later withdrew that appeal.

[158] *Id*. at 416-17.

[159] *Id*. at 417. The relevant provision of General Statutes § 45a-288 is as follows:

(a) When a will conveying property situated in this state has been proved and established out of this state by a court of competent jurisdiction, the executor of such will or any person interested in such property may present to the Probate Court in the district determined under the provisions of section 45a-287 an authenticated and exemplified copy of such will and of the record of the proceedings proving and establishing the will and may request that such copies be filed and recorded. The request shall be accompanied by a complete statement in writing of the property and estate of the decedent in this state. If, upon a hearing, after such notice to the parties in interest as the court orders, no sufficient objection is shown, the Probate Court shall order such copies to be filed and recorded, and they shall thereupon become a part of the files and records of such court, and shall have the same effect as if such will had been originally proved and established in such court.

(b) Nothing in this section shall give effect to a will made in this state by a resident of this state which has not been executed according to the laws of this state.

(c) If the Probate Court finds sufficient objection to such will, the applicant shall offer competent proof of the contents and legal sufficiency of the will, except that the original thereof need not be produced unless so directed by the Probate Court.

[160] 162 Conn. App. at 417.

[161] *Id*. at 417-18.

[162] *Id*. at 424-25.

[163] *Id*. at 425.

On appeal, the Appellate Court took a restrictive view of the term "sufficient objection" as used in General Statutes Section 45a-288. Specifically, the Court held that, "To present sufficient objection to the filing and recording of a will executed in a foreign state, one may… present evidence that the record does not establish that the will was proved and established in a foreign jurisdiction, that the petitioner failed to produce an authenticated and exemplified copy of the will, that the decedent did not own property within the state, or that a death has not, in fact, occurred."[164]

Although it did not make it explicit, the Appellate Court appears to be saying that the "objection" made to the will's admission must be that the executor has failed to comply with one of the requirements of General Statutes Section 45a-288 itself, and not some underlying objection that should have been litigated in the domiciliary jurisdiction at the time of original probate. Unfortunately, the Appellate Court's opinion, like the superior court's oral decree, could be clearer on this point. Also, due to how the issue was framed on appeal, the Court did not explicitly address the relevance of the full faith and credit clause of Article IV, Section 1 of the U. S. Constitution.[165]

E. *Fiduciaries*

1. Statutory Theft

In *Wake v. Piedrahita*,[166] the superior court held that a fiduciary who misappropriates funds can be found to have committed statutory theft, a serious tort resulting in treble damages plus punitive damages.

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[164] *Id*. at 429.

[165] Somewhat perplexing in this regard is the Appellate Court's suggestion that a sufficient objection might be that "that a death has not, in fact, occurred." *See id*. at 429. By this example, the Court seems to imply that a probate court's determination that a death has occurred (an essential requirement for granting a will to probate) might not be given full faith and credit in an ancillary probate proceeding. The Court's subsequent observation that "[t]he Connecticut relatives presented no evidence that the decedent's will did not comply with the law of the commonwealth of Pennsylvania regarding the execution of a will …" similarly implies that under different facts the heirs would have been able to relitigate in Connecticut a question of Pennsylvania law that the Pennsylvania court had previously resolved. *See id*. at 429.

[166] No. FSTCV146021779S, 2016 WL 1710290 (Conn. Super. Ct. Apr. 7, 2016).

The facts concerned a trustee who paid personal expenses from a trust account.[167] The successor trustee brought a cause of action alleging, inter alia, that the defendant's actions constituted statutory theft under General Statutes Section 52-564.[168] The superior court agreed.[169] Although noting that the tort required a degree of "intent over and above" that required to commit a breach of fiduciary duty or even conversion, the court found that high standard had been met under the egregious facts of the case.[170]

The case stands as a warning to fiduciaries, and those who advise them, that those who mishandle trust funds may be liable for penalties that go well beyond compensatory damages.

2. Fiduciary Duties

In *Heisinger v. Cleary*,[171] the Connecticut Supreme Court considered the degree of care a fiduciary must exercise when selecting and retaining a professional to assist with the administration of an estate or trust. The Court read the Connecticut Fiduciary Powers Act to set a relatively low bar in these circumstances, giving broad liability protection to fiduciaries who act with reasonable prudence. We think the case raises significant issues, and we question whether the applicable governing law is as clear as the Court suggests. Future legislative or judicial actions may be necessary to fully resolve the issue.

The underlying dispute arose in the context of an estate administration.[172] The governing will incorporated the Connecticut Fiduciary Powers Act, which includes the following power:

> (19) Employ and Compensate Agents, etc. To employ and compensate persons deemed by the fiduciary needful to

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[167] *Id.* at *1-*2.

[168] *Id.* at *4. General Statutes § 52-564 provides as follows: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

[169] *Id.*

[170] *Id.*

[171] 323 Conn. 765 (2016).

[172] *Id.* at 768-69.

> advise or assist in the proper settlement of the estate or administration of any trust including, but not limited to: Servants, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, real estate managers, rental agents, realtors, appraisers, and investment counsel, custodians and other professional advisors as reasonably may be required or desired in managing, protecting and investing the estate or any trusts without liability for any neglect, omission, misconduct, or default of such person provided such person was selected and retained with due care on the part of the fiduciary. If investment counsel is selected, which at the time of selection has a reputation in its community for competence and fair dealing, its selection and retention shall be considered as having been made with due care, provided the fiduciary continues to retain such counsel only so long as such counsel maintains said reputation. Under said circumstances, the fiduciary shall have no investment responsibility whatever and may act without independent investigation upon the recommendations of any such person, without liability for any neglect, omission, misconduct, or default of such person.[173]

Pursuant to this power, the defendant executor hired a professional appraiser to value the decedent's closely-held business and paid taxes based upon that value.[174] The plaintiff beneficiary later contended that the professional appraiser overvalued the business resulting in overpayment of taxes and sought to recover this excess from the executors.[175] Defendants moved for summary judgement on numerous grounds, and the trial court granted their motion.[176] An appeal ensued and reached the Supreme Court.

The Supreme Court upheld the trial court, finding that the relevant provision of the Fiduciary Powers Act shield a fiduciary from liability for the actions of a professional when that professional "was selected and retained with due care on the part of the fiduciary."[177] The Court defined due care

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[173] CONN. GEN. STAT. § 45a-234(19).
[174] *Heisinger v. Cleary*, 323 Conn. at 770-71.
[175] *Id.* at 771.
[176] *Id.* at 773-74.
[177] *Id.* at 774.

in terms of ordinary negligence, concluding that a fiduciary would only be liable for the failings of a professional if "there was a deficiency in the professional's qualifications or integrity that would be obvious to an ordinary person, existing at the time the professional was selected and retained."[178] To violate this provision, a fiduciary must ignore deficiencies "that no reasonable person, having ordinary knowledge, would have disregarded."[179]

We think the Court's opinion raises two significant issues. First, we do not think the statute is clear when it refers to a fiduciary's decision to "select and retain" a professional. The Court seemingly reads that phrase to refer to the initial choice to pick and hire the professional, to "retain" in the sense that one might hire a lawyer. But "retain" can have an alternate, ongoing, connotation, such as to retain an heirloom or investment. The court specifically rejected this latter reading of the word, stating that once a professional is prudently selected and hired "the fiduciary has no further responsibility to second-guess the work provided by the professional."[180] Nevertheless, we contend that the statute could support that alternative meaning.[181]

The second question raised by the case is how the statute at issue would apply in the circumstance of a trustee selecting an investment advisor. The statute contains a specific provision addressing that situation, making clear that the trustee's obligation is solely to select an advisor with a "reputation in its community for competence and fair dealing,"

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178 *Id.* at 780.

179 *Id.* at 781.

180 *Id.* at 783.

181 Although a detailed statutory interpretation is beyond the scope of this article, this reading of the word "retain" would be consistent with its meaning as used elsewhere in the Fiduciary Powers Act. *See* CONN. GEN. STAT. § 45a-234(1) ("[t]o retain for such time as the fiduciary shall deem advisable any property, real, personal or mixed, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.); CONN. GEN. STAT. § 45a-234(15) ("…to acquire the property … and to retain the property....); CONN. GEN. STAT. § 45a-235 (1) ("To retain and invest and reinvest in and purchase any stock or other securities issued by the fiduciary…."); CONN. GEN. STAT. § 45a-235 (2) ("To retain and to purchase insurance contracts…."); CONN. GEN. STAT. § 45a-235 (3) ("To retain, invest and reinvest in partnerships…."); CONN. GEN. STAT. § 45a-235 (4) ("To retain, trade and speculate in any real, personal or mixed property ….").

with no obligation to monitor that advisor's specific handling of the trust itself.[182] This language directly contradicts, and seemingly trumps,[183] the analogous provision of the prudent investor act, which would obligate the trustee to monitor portfolio performance on an ongoing basis.[184] Accordingly, the drafter's decision of whether or not to incorporate General Statutes Section 45a-234(19) into a trust could dramatically alter the standard of care applicable to a trustee's selection of an investment manager. Attorneys need to pay careful attention to this issue when drafting and administering trust documents.

F. *Families and Children*

1. Adult Adoption

In *Eder v Appeal From Probate*,[185] the superior court considered the question of whether a person adopted as an adult would become a remainderman of a trust previously established by the adoptive parent. The court's lengthy opinion provides a detailed analysis of the legal and policy implications of adult adoption.

The facts concern an irrevocable trust a settlor established in 1991 for his own benefit.[186] The settlor was to receive $114,000 from the trust each year for 20 years, after which time the remaining principal would be distributed to his descendants.[187] At the time he created the trust, the settlor had one child, but shortly before the termination of the 20-year trust term, he adopted two adults.[188] The probate court determined that all three children were entitled

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182 CONN. GEN. STAT. § 45a-234(19).

183 General Statutes § 45a-235 provides in relevant part as follows: "In the event of a conflict between one or more of the powers contained in sections 45a-234 and 45a-235, and any other provision of the general statutes, the power or powers contained in sections 45a-234 and 45a-235 shall govern."

184 General Statutes § 45a-541i provides in relevant part that a trustee who delegates investment management responsibility to a professional "shall exercise reasonable care, skill and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.").

185 No. CV146045533S, 2016 WL 1265763 (Conn. Super. Ct. Mar. 2, 2016).

186 *Id.* at *1.

187 *Id.*

188 *Id.* at *2.

to share in the trust remainder, and the biological child appealed.[189]

The superior court began its analysis by interpreting the language of the governing trust document, ultimately concluding that under the terms of the trust, adopted descendants were to be treated the same as natural descendants.[190] However, that left the court with what it considered "the difficult part of this case," namely the question of whether the adoptions were a "sham and subterfuge to avoid the intent and purposes of the trust."[191] If so, the court, as a matter of public policy, might prohibit the adopted descendants from taking under the trust.[192]

The court noted the absence of any Connecticut jurisprudence directly on point and thus turned to other states' law to determine how those jurisdictions have dealt with similar questions.[193] Although the court referenced a large number of cases from other states, it framed its analysis around two major precedents. The first was *Minary v. Citizens Bank and Trust*, where the Kentucky Supreme Court refused to recognize a trust beneficiary's adoption of his own wife in an effort to make her his child for purposes of trust distributions, because to do so would "thwart[] the intent of the ancestor whose property is being distributed and cheat[] the rightful heirs."[194] The second guidepost was *Davis v. Nielson*, where the Missouri Court of Appeals refused to recognize six adopted adults as "children" entitled to trust distributions.[195] The court in that case reasoned that the adoptees (three of the adoptive parent's friends, his nephew, his secretary, and the secretary's son) were "total strangers" to the trust settlor and lacked any practical parent-child relationship with the adoptive parent.[196] Accordingly, as in

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189 *Id.*
190 *Id.* at *8.
191 *Id.* at *9.
192 *Id.*
193 *Id.* at *10.
194 *Id.* (quoting Minary v. Citizens Fidelity Bank & Trust, 419 S.W.2d 340, 343 (Ky. 1967)).
195 *Id.* at *15 (citing Davis v. Nielson, 871 S.W.2d 35 (Mo. Ct. App. 1994) and referring to it as "the most instructive case in this area.").
196 *Id.* at *15 (quoting Davis v. Nielson, 871 S.W.2d 35 (Mo. Ct. App. 1994)).

Minary, the *Davis* court ignored those adoptions for trust purposes.[197]

In considering these precedents, and numerous others, the superior court found an organizing principle – that other states tended to recognize adult adoptions where the adoptive parent and adoptive child previously acted toward each other like parent and child and ignore those where that type of relationship was lacking.[198] Applying this rule to the case at bar, the court concluded that here the settlor and the adopted adults shared a "family bond … for years preceding the adoptions" making the adopted individuals "natural objects of [the settlor]'s natural bounty."[199] Accordingly, the court distinguished the case at bar from *Minary* and *Davis*, concluding that the adoption was not a sham that violated public policy, but rather a valid means by which the settlor gave legal status to two adults he had long treated like family.[200]

While the court's opinion is strictly limited to the specific facts at bar, it provides a useful survey of the law on an important policy question.

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197 *Id.* at *17.
198 *Id.*
199 *Id.* at *20.
200 *Id.*

SURVEY OF 2016 DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

By Jeffrey J. Mirman*

Since the last survey there has been a substantial increase in the number of cases filed claiming discrimination or failing to pay wages. For example, employment charges filed with the Connecticut Commission on Human Rights and Opportunities increased by more than 7% for the fiscal year ending June 30, 2016, over the prior year. Increases in the types of discrimination charged included physical disability, race, and age.

I. Supreme Court Cases

The term ending in June, 2016, did not produce any major employment decisions from the Court. Nevertheless, there were some highlights.

In *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*,[1] the Court concluded that a defendant was entitled to attorneys' fees in a Title VII action even when there was not final judgment in its favor on the merits of the plaintiff's claim. The EEOC brought suit on behalf of a named plaintiff and a group of employees under Section 706 of Title VII without obtaining class certification. The Commission sought to enjoin the company from permitting a sexually hostile and offensive work environment. After a series of motions, the District Court dismissed the EEOC's complaint, finding the allegations of pattern or practice insufficient, and that the EEOC failed to satisfy its pre-suit obligation to seek conciliation.[2] The Company sought and obtained an award of attorneys' fees. The Supreme Court held that attorneys' fees may be awarded to a defendant who prevails, although not on the merits of the underlying claim, because one of the purposes of such

* Of the Hartford Bar. The author wishes to thank Margaret Sheahan for her infinite patience, careful editing, and helpful suggestions in improving the content of both this year's and last year's surveys.

1 136 S. Ct. 1642 (2016).

2 *Id*. at 1648-1649.

an award is "to deter the bringing of lawsuit without foundation", and when a plaintiff's claim was "frivolous, unreasonable, or groundless."'[3]

In *Green v. Brennan*,[4] a 7-1 majority ruled that the limitation period for filing a Title VII charge of discriminatory constructive discharge begins when the employee feels forced to resign and actually resigns, rather than the last act of discrimination. The employee, a postmaster in Colorado, was passed over for a promotion. He complained of race discrimination with the post office's equal employment opportunity office. Thereafter his supervisors accused him of misconduct, prompting an investigation and his reassignment to off-duty status with no pay, and finally his being given the choice of a demotion to another location or to retire. The plaintiff chose to retire, and then filed his charge. His charge, however, was made more than 45 days (the federal employee time limit) after the employer's last action against him, the delivery of the ultimatum.

In holding that the limitations period began to run upon resignation, the Court concluded that the standard rule requires the Court to determine what a "complete and present cause of action" is."[5] A constructive discharge occurs when "working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign."[6] A plaintiff must show both that working conditions became so intolerable that he felt compelled to resign and that he actually did resign. It is only after both elements have occurred that an employee's cause of action accrues and he can bring suit. Since an ordinary discharge claim accrues when the employee is fired, it makes sense to begin to run the clock on a constructive discharge claim when the employee resigns, or is constructively fired.[7] Interesting opinions by Justice Alito (concurring)[8]

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[3] *Id*. at 1652, quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420, 422 (1978).
[4] 136 S. Ct. 1769 (2016).
[5] *Id*. at 1776.
[6] *Id*., quoting Pennsylvania State Police v. Suders, 542 U.S. 19, 141 (2004).
[7] *Id*. at 1777.
[8] *Id*. at 1782.

and Thomas (dissenting)[9] parse the logical issues surrounding the nature of constructive discharge and provide fodder for future debate surrounding such claims.

In *Heffernan v. City of Paterson*,[10] the Court ruled, 6-3, that a police officer could pursue a claim under 42 U.S.C. Section 1983 that he was demoted because of his perceived politics, in violation of the First Amendment. The plaintiff police officer, at his mother's[11] request, picked up a sign in support of a candidate for mayor of Paterson. Other members of the police force saw the plaintiff speaking to the candidate's campaign staff, and it was assumed, wrongly, that he was involved in the campaign. The next day he was demoted from detective to patrol officer. Reminding readers that the Constitution prohibits government employers from discharging or demoting employees because the employee supports a particular political candidate, the Court assumed that the plaintiff's supervisors thought he had engaged in activities that could not be constitutionally prohibited or punished.[12] Notwithstanding that the plaintiff was not engaged in political activity, the Court reasoned: "[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 – even if, as here, the employer makes a factual mistake about the employee's behavior."[13] Justice Thomas, joined by Justice Alito in dissent, reasoned that the fact that the plaintiff admittedly had not exercised any First Amendment right should preclude his suit for having been deprived of such a right.[14]

In *Encino Motorcars, LLC v. Navarro*,[15] the Court declined to give deference to the Department of Labor's change in policy regarding whether automobile dealer service

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9 *Id*. at 1790.
10 136 S. Ct. 1412 (2016).
11 *Id*. at 1416.
12 *Id*. at 1417.
13 *Id*. at 1418.
14 *Id*. at 1420.
15 136 S. Ct. 2117 (2016).

advisors were included within salesmen, partsmen or mechanics and thus exempt from the overtime requirements of the Fair Labor Standards Act. In 2011 the Department changed its long-standing interpretation of 29 U.S.C. Section 213(b)(10) to conclude that service advisors were not exempt. However, the Court found that the Department did not follow the two-step analysis for promulgating a regulation interpreting a statute it enforces, as required by *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc*.[16] That test required the Court to determine if the law was unambiguous. If ambiguous, then the Court must defer to any agency interpretation that is "reasonable."[17] In this case the Court found that the Department failed to give adequate reasons for its decision, and given the agency's change in interpretation of a long-standing regulation it could not stand.[18] The case was remanded to the Ninth Circuit. In dissent,[19] Justice Thomas joined, by Justice Alito, agreed the regulation deserved no deference but would have gone further to answer the statutory interpretation question and rule that service advisors are covered by the exemption.

II. Second Circuit Court of Appeals and Connecticut District Court Cases

A. *Second Circuit Cases*

In last year's Survey we discussed at some length the Second Circuit's decision in *Glatt v. Fox Searchlight Pictures*,[20] in which the Court established the test for determining whether interns should be considered employees, and therefore paid for their time.[21] In 2016 the court amended and superseded that decision.[22] The court held that the primary consideration of whether the intern should

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16 467 U.S. 837 (1984).
17 *Id*. at 2125.
18 *Id*. at 2127.
19 *Id*. at 2129.
20 791 F.3d 376 (2d Cir. 2015).
21 *See* Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 Conn. B. J. 141, 146 (2016).
22 811 F. 3d 528 (2d Cir. 2016).

be considered an employee is whether the intern or the employer was the primary beneficiary of the working relationship. While leaving intact the seven-part test we discussed last year, the court added a new consideration:

> The intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).[23]

Courts may, therefore, consider evidence about an internship program as a whole rather than focusing solely on the individual experience of each intern. The court made clear that its approach applies only to bona fide internships, where there is no expectation of compensation and the training is similar to that provided in an education environment, and not to other training programs.[24]

In *Graziadio v. Culinary Institute of America*,[25] the Second Circuit adopted the economic-reality test used to analyze individual liability under the Fair Labor Standards Act to claims under the Family and Medical Leave Act.[26] In determining whether an individual is an employer, the court will consider

> whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[27]

In the FMLA context, a court must determine "whether the putative employer 'controlled in whole or in part plaintiff's rights under the FMLA.'"[28] In concluding that an individ-

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[23] *Id*. at 536.
[24] *Id*. at 537.
[25] 817 F. 3d 415 (2d Cir. 2016).
[26] *Id*. at 422.
[27] *Id*. at 422 (internal citations omitted).
[28] *Id*. at 423, quoting Noia v. Orthopedic Assocs. of Long Island, 93 F. Supp. 3d 13, 16 (E.D.N.Y. 2015).

ual supervisor may be considered an employer under the FMLA, the court found the following factors important:

- The supervisor held substantial influence over whether to discharge the plaintiff;
- The supervisor exercised control over the plaintiff's schedule and conditions of employment, including her return from FMLA leave;
- The supervisor controlled the administration of the FMLA leave.[29]

In *Vasquez v. Empress Ambulance Service, Inc.*, we learned from the Second Circuit that it has finally accepted the "cat's paw" theory of liability against negligent employers influenced by nonsupervisory employees' unlawful motives in employment retaliation cases. The phrase comes from an Aesop fable in which a monkey persuades a cat to pull chestnuts from a fire so that they might share them, but the monkey eats all of the chestnuts before the cat has an opportunity to eat even one, leaving the cat with a burnt paw. "[T]he 'cat's paw' metaphor now 'refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action.'"[30] By negligently allowing an employee to get away with a discriminatory motive and action, "the employer plays the credulous cat to the malevolent monkey and, in so doing, allows itself to get burned – i.e., successfully sued."[31]

The facts of *Vasquez* are instructive. The plaintiff, an ambulance EMT, was harassed by a dispatcher with the defendant employer. Plaintiff complained to a supervisor about the dispatcher's conduct. The dispatcher manipulated cell phone messages and a photograph to make it appear

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29 *Id.* at 423-424.
30 *Id.* at 272 (internal citations omitted).
31 *Id.*

that she had a consensual sexual relationship with Vasquez, and provided the false information to management. Before the plaintiff had a chance to contradict the false statement of a consensual relationship, management had concluded that the plaintiff had falsely accused the dispatcher, and refused to see the plaintiff's own cell phone to determine the accuracy of what had been provided. The plaintiff was fired for her false accusation and for engaging in sexual harassment against the dispatcher.[32]

The *Vasquez* court concluded that the company's negligence in crediting the dispatcher's evidence, to the exclusion of all other evidence, when a reasonable investigation would have disclosed the truth of the dispatcher's animus against the plaintiff, caused the dispatcher's accusations to form the sole basis of the decision to discharge the plaintiff. An employer will not be held liable on a cat's paw theory when the employer is not negligent in relying upon a false report of an employee who acted out of an animus that is prohibited by Title VII – in this case sexual harassment. "Only when an employer in effect adopts an employee's unlawful animus by acting *negligently* with respect to the information provided by the employee, and thereby affords that biased employee an outsize role in its own employment decision, can the employee's motivation be imputed to the employer and used to support a claim under Title VII."[33]

In *Constellation Brands, U.S. Operations, Inc. v. National Labor Relations Board*,[34] the court concluded, as had six other circuits previously, that the method of evaluating proposed bargaining units set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*,[35] is lawful. Under *Specialty Healthcare*, "the Board must consider [w]hether the employees are organized into a *separate* department; have *distinct* skills and training; have *distinct* job functions and perform *distinct* work . . .; are functionally integrated with the Employer's other employees; . . . have *dis-*

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[32] *Id*. at 270-271.
[33] *Id*. at 275 (italics in original).
[34] 842 F. 3d 784 (2d Cir. 2016).
[35] 357 N.L.R.B. 934 (2011).

tinct terms and conditions of employment; and are *separately* supervised."[36] The Board must also consider whether employees proposed for a bargaining unit have an "overwhelming community of interests," such that the employer must show "'that there is no legitimate basis upon which to exclude'" certain employees from the unit.[37] The court determined that the Board's Regional Director failed to conduct an appropriate analysis between existing unit members and other employees. He failed, for example, to discuss the import of "physically separate locations" or "separate front-line [and immediate supervisors," and whether those findings should outweigh findings or similarities between the two groups of employees.[38] Accordingly, the court refused to enforce the Board's order that the company bargain with the union concerning the proposed bargaining unit.[39]

In *Hill v. Delaware North Companies Sportservice, Inc.*,[40] the court concluded that food service workers at Oriole Park, the home of the Baltimore Orioles baseball team, were employed at an "amusement or recreational establishment" within the meaning of the Fair Labor Standards Act, 29 U.S.C. Section 201 et. seq., and thus were exempt from the overtime requirements pursuant to Section 213(a)(3).[41] The court found that the food, drink and merchandise sold by the company "are predominately for baseball game attendees' use and consumption as they watch the game, and they enhance the amusement or recreational value of watching the game." Accordingly, these "operations have an amusement or recreational character because they provide a measure of amusement or recreation that would otherwise be absent from the stadium."[42] The court's inquiry did not

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36 842 F. 3d 784 at 792 (internal citation omitted)(italics in original).
37 *Id*. at 795.
38 *Id*. at 794.
39 *Id*. at 795.
40 838 F. 3d 281 (2d Cir. 2016).
41 Readers may recall from last year's Survey that the Second Circuit analyzed the scope of the seasonal amusement or recreational establishment exemption in *Chen v. Major League Baseball Properties, Inc.*, 798 F. 3d 72 (2d Cir. 2015). *See* Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 CONN. B. J. 141, 154 (2016).
42 *Id*. at 288.

end there because one of two tests had to be further satisfied in order to claim the exemption. The company failed to satisfy the seasonal operations test, meaning it had to operate for fewer than seven months, because it continued to operate the Orioles Team Store and a brew pub during the off season. However, the company did satisfy the optional test, which requires that the preceding calendar year's average receipts during any six month period not exceed 33% of its average receipts during the other six months, as the court (and the US Department of Labor's Field Operations Handbook) adapted the test for employers having been in operation for less than a full calendar year.[43]

B. *Connecticut District Court Cases*

1. Discrimination Cases

The District Court judges issued more decisions in discrimination cases than in prior years. Significantly, there have been decisions in which judgment has been entered for employers on the issue of discriminatory conduct, and in the same case judgment has entered for the employee on the issue of retaliation. The first case we discuss, decided by Judge Bolden, is one such case.

In *Vera v. Alstom Power, Inc.*,[44] a jury found for the employer on the plaintiff's sex discrimination claim, but for the plaintiff on her retaliation claim in violation of Title VII and the Connecticut Fair Employment Practices Act. The jury awarded the plaintiff non-economic emotional distress damages in the amount of $500,000, and punitive damages in the amount of $350,000. The employer moved for judgment as a matter of law, claiming there was but one conclusion a reasonable jury could have reached.[45] The decision is particularly interesting, however, in its rulings on the defendant's post-trial motions on remedies.

Vera filed a claim of sex discrimination against the defendant. Six months after the filing of her complaint, she

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[43] *Id*. at 295.
[44] 189 F. Supp. 3d 360 (2016).
[45] *Id*. at 368.

was denied a performance evaluation and raise, and soon thereafter she was fired. A human resources representative and the plaintiff's supervisor's own supervisor each testified that the plaintiff did not receive a performance evaluation because of her CHRO complaint.[46] Judge Bolden ruled that the temporal proximity between the complaint and the discharge, plus the supervisor's reaction to the filing of the complaint, created an inference of retaliation.[47] The jury could also have reasonably rejected the employer's proffered reason for the termination – reducing head count – as a pretext. The jury could have disbelieved the defendant's testimony, and concluded that the fluctuating head counts were manipulated in an effort to justify the selection of the plaintiff for discharge.[48]

Judge Bolden concluded, nevertheless, that the jury's award of $500,000 in non-economic damages was excessive, and reduced the amount to $125,000. He found that Vera suffered "garden variety" emotional distress, and the award of the jury was excessive and "shocked the conscience" under both federal and state standards.[49]

> In 'garden variety' emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. . . . Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration.[50]

Evaluating Vera's testimony with what supported awards in other cases, including *Patino v. Birken Mfg. Co.*,[51] the court concluded that $125,000 was at the upper end of awards for "garden variety" emotional distress damages.[52]

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46 *Id.* at 369.
47 *Id.* at 369-370.
48 *Id.* at 370-371.
49 *Id.* at 374.
50 *Id.* at 376, quoting Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009).
51 304 Conn. 679, 708 and n. 26 (2012).
52 189 F. Supp. at 379.

Judge Bolden also decided that an award of punitive damages to Vera was appropriate, but reduced the amount to $50,000. He observed that such damages are appropriate under Title VII when the "defendant 'engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'"[53] A defendant acts with malice or reckless indifference when an employer knows that it may be acting in violation of federal law.[54] Here the jury could have found that the decision-makers received employment discrimination training, or otherwise were aware of the federal prohibition against retaliation. The jury could also have found that the proffered reason for the employer's conduct was a pretext and an attempt to mask its retaliation.[55] Nevertheless, Judge Bolden found that the award of $350,000 shocked the conscience, and reduced it to $50,000. Applying the factors set forth in *BMW of N. Am. Inc. v. Gore*,[56] he concluded that the defendant's conduct was not reprehensible, the award was too high when compared to the harm suffered, and it was too high when compared to awards in other cases.[57]

Judge Bolden also ordered *Vera*'s reinstatement as the remedy preferred over front pay. He concluded that the relationship between the plaintiff and others at the defendant was not so contemptuous or strained as to be unworkable.[58]

In *Mendillo v. Prudential Insurance Company of America*,[59] a 15-year customer service representative, who was far older than most of her coworkers, previously recognized as a stellar employee and apparently the only employee in her group ever to receive the word "senior" added to her title, was fired after her performance declined following a serious auto injury that required her to take Family and Medical Leave Act and to reduce her hours from 10, eventually to 7,

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53 *Id*. at 380, quoting 42 U.S.C. Section 1981a(b)(1).
54 *Id*. (citation omitted).
55 *Id*.
56 517 U.S. 559, 574-75 (1996).
57 *Id*. at 384.
58 *Id*. at 390-392.
59 156 F. Supp. 3d 317 (D. Conn. 2016).

hours each day. She claimed age and disability discrimination, failure to accommodate disability under the federal and Connecticut statutes, federal FMLA interference, and retaliation. The defendant moved for summary judgment on all counts. All that survived were her disability discrimination and failure to accommodate claims and her FMLA retaliation claims.

Analyzing Mendillo's age discrimination claims under the burden-shifting framework of *McDonnell Douglas*,[60] Judge Bolden acknowledged that the plaintiff must set forth a prima facie case, following which the defendant bears the burden of articulating a legitimate, non-discriminatory reason for its action, which the plaintiff can overcome by showing the employer's conduct was in fact the result of intentional discrimination.[61] Judge Bolden observed that the trier of fact may infer discrimination from the falsity of the employer's explanation or that it is unworthy of credence. Nevertheless, the plaintiff must establish that but for the plaintiff's age, the discriminatory conduct would not have occurred. Even if other legitimate factors existed, the plaintiff's age must be "'the straw that broke the camel's back.'"[62]

Judge Bolden found that Mendillo set forth a prima facie case of age discrimination. Concluding that the plaintiff was qualified for the position, he noted that the plaintiff was required to establish only that she had the basic skills for her position; she had been performing those responsibilities for more than fifteen years at the time of her discharge. He also found that many of the plaintiff's responsibilities were assigned to younger employees.[63] He then concluded that the employer had satisfied its burden of articulating a legitimate, non-discriminatory reason for the discharge – the plaintiff's failure to maintain required call quality scores – and that the plaintiff had insufficient evidence to create an issue of fact of pretext. All employees were held to the same standard regarding call quality scores, and therefore, there

60 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
61 156 F. Supp. 3d at 338.
62 *Id.*, quoting Burrage v. United States, 134 S. Ct. 881, 888 (2014).
63 *Id.* at 339.

was no basis to conclude that younger employees were treated more favorably. Therefore, the plaintiff's Age Discrimination in Employment Act ("ADEA") discrimination claim failed.[64] Summary judgment was also granted on the Connecticut Fair Employment Practices Act ("CFEPA") claim because this finding made the unclear issue of whether a motivating factor or a "but for" standard applies to age claims under the Connecticut Fair Employment Practices Act ("CFEPA") irrelevant.[65] The court also rejected the plaintiff's age discrimination-related retaliation claims. While she registered many complaints with the defendant about her treatment, and in particular whether her call quality scores were accurate, she never complained that she was being discriminated against because of her age.[66]

Judge Bolden did, however, find that Mendillo's disability discrimination claim survived summary judgment. He found that following her automobile accident, the plaintiff had permanent physical constraints, including that she could not sit for prolonged periods, and she required breaks from uninterrupted sitting, circumstances that were both obvious and communicated by Mendillo to the defendant. Judge Bolden found that the defendant knew of the plaintiff's disability, and therefore, had an obligation to make a reasonable accommodation, even if not specifically requested.[67] Here there was evidence that the defendant failed to determine whether a reasonable accommodation could have been offered.[68] Judge Bolden also permitted the plaintiff's claims of discharge based on disability discrimination to go forward, since a failure to accommodate leading to discharge was a possible finding from the undisputed evidence.[69] Summary judgment was granted on plaintiff's ADA and CFEPA disability-based retaliation claims, however, again due to a finding that she made no formal or even informal

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64 *Id*. at 340.
65 *Id*. at 345.
66 *Id*. at 341.
67 *Id*. at 342.
68 *Id*.
69 *Id*. at 343 and 345.

complaints protesting disability discrimination.[70]

Judge Bolden's determination of Mendillo's FMLA claims are interesting. Finding that the removal of some duties during her use of intermittent and reduced schedule FMLA after her return to work was consistent with the treatment of non-leave takers falling below quality standards, the court granted summary judgment on the interference claim.[71] Yet the same fact was part of the reason that summary judgment was denied on the FMLA retaliation claim.[72]

Judge Bolden reached different conclusions about a plaintiff's evidence of age discrimination in *Schneider v. Regency Heights of Windham, LLC*,[73] denying the employer's motion for summary judgment. Mr. Schneider, 63 years old at the time of his discharge in November 2012, had worked at the defendant's health care facility for four years as its supervisor of maintenance services, responsible for the upkeep of the physical plant. As often happens in these cases, Mr. Schneider's superiors in the chain of command took over for others less than one year prior to the discharge. His direct supervisor issued him a final written warning in July 2012, as a result of two incidents that occurred over a weekend. In October 2012, Mr. Schneider was criticized for his handling of preparations for Hurricane Sandy, and he was ultimately discharged. In recommending that Mr. Schneider be discharged his supervisor reported these incidents, and also mentioned Mr. Schneider's age and date of hire.[74] Following his discharge Mr. Schneider was replaced by someone who was 51 years old.

Applying the *McDonnell Douglas* burden-shifting analysis Judge Bolden found that Mr. Schneider had established a prima facie case of age discrimination. He was "generally qualified" for his position, was within the protected class, and was replaced by someone who was 11 years younger.

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70 *Id*. at 344-345.
71 *Id*. at 347.
72 *Id*.
73 No. 3:14-cv-00217(VAB), 2016 WL 7256675.
74 *Id*. at *5.

Judge Bolden found that this difference in age was "'not insignificant.'"[75] He then found that the defendant articulated a legitimate, non-discriminatory reason for the discharge, namely poor performance.[76]

Judge Bolden then considered Mr. Schneider's evidence of pretext. While thin, the court considered it sufficient to survive summary judgment, although not necessarily adequate to survive motions *in limine* at the time of trial. This evidence included the use of Mr. Schneider's age in the recommendation to terminate his employment; inconsistencies in the supervisor's testimony regarding the events for which discipline was claimed to be appropriate, and statements of both of Mr. Schneider's supervisors concerning the ages of other employees.[77]

In considering the evidence of statements about or treatment of other employees, Judge Bolden considered when it is appropriate to consider this "'me too'" evidence. The factors to consider include:

> (1)Whether the evidence is logically or reasonably tied to the decision made with respect to the plaintiff; (2)whether the same 'bad actors' were involved in the 'other' conduct and in the challenged conduct; (3) whether the other acts and the challenged conduct were in close temporal and geographic proximity; (4) whether decision makers within the organization knew of the decisions of others; (5) whether the other affected employees and the plaintiff were similarly situated; and (6) the nature of the employees' allegations.[78]

Judge Bolden found the evidence of the "me too" claims to be sufficient to survive summary judgment, although he indicated he was "not inclined to admit this evidence at trial".[79] Other judges may very well have found the evidence of claimed pretext to be insufficient, and may very well have

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[75] *Id*. at *10, quoting Tarshis v. Riese Organization, 211 F. 3d 30, 38 (2d Cir. 2000).

[76] *Id*.

[77] *Id*. at *11.

[78] *Id*. at *12, quoting Murray v. Miron, No. 3:11-cv-629(JGM), 2015 WL 5840170 (D. Conn. 2015).

[79] *Id*. at *13.

granted the defendant's motion for summary judgment.

Judge Bolden again, as in *Mendillo*, *supra*, chose to duck the issue of whether the motivating factor test applies to age discrimination cases under the Connecticut Fair Employment Practices Act, or whether the "but for" analysis required in ADEA actions applies since the U.S. Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*[80]

In *Gaydos v. Sikorsky Aircraft, Inc.*,[81] Judge Bolden applied the *McDonnell Douglas* analysis to plaintiff's claims of discrimination and retaliation for taking leave under the Family and Medical Leave Act in considering the defendant's motion for summary judgment. Plaintiff took intermittent leave over a multi-year period of time to care for his elderly and ailing parents. On several occasions one of the plaintiff's supervisors told plaintiff his use of leave was "unacceptable" and "aggressively" suggested the plaintiff hire a caregiver. Sometime later the plaintiff's supervisors transferred the plaintiff from his own position as a supervisor into a coordinator position. Thereafter his performance reviews were mixed, although he was rated as "fully competent" at the time of the termination of his employment, which took place in a large scale reduction in force.[82]

Judge Bolden concluded that Gaydos submitted sufficient evidence to support his claim that he was transferred because of his use of FMLA leave. The analysis did not stop there, however, because the evidence did not show that he suffered an adverse employment action. Although initially transferred to a coordinator position, he was quickly restored to a supervisor position. The court also rejected the plaintiff's claim that he was treated less favorably than other employees because of his FMLA leave before his discharge.[83]

Nevertheless, Judge Bolden permitted Gaydos' claim

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[80] 557 U.S. 167, 176 (2009). *See also* our discussion of the same issue in Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 CONN. B. J. 141, 158-59 (2016).

[81] No. 14-cv-636(VAB), 2016 WL 4545520.

[82] *Id.* at *6, 7.

[83] *Id.* at *9, 10, 11.

that he was selected for termination as part of the reduction in force because he took FMLA leave. Although he was a generally competent employee who had some issues with job performance throughout his career, Judge Bolden found there was a triable issue over whether the criticisms of plaintiff's performance were pretextual and motivated by his use of FMLA leave. The court also found these facts sufficient to create a triable issue of whether the plaintiff's supervisors wrongly interfered with his taking of FMLA leave because the FMLA animus may have influenced the performance scores assigned to the plaintiff, which may have played a role in selecting the plaintiff for layoff. Thus, the plaintiff's use of his leave may have been a negative factor in the decision to terminate him.[84]

Judge Bolden refused to dismiss a retaliation and interference case brought by the EEOC on behalf of a disabled employee under the Americans with Disabilities Act in *Equal Employment Opportunity Commission v. Day & Zimmerman NPS, Inc.*[85] The defendant hired an electrician, Gregory Marsh, in September 2012 to work at the Millstone Power Plant. A month later, following his discharge, Marsh filed a charge of discrimination with the EEOC, claiming that the defendant's failure to accommodate and unlawful discharge in violation of the ADA.[86]

Almost a year and a half later, in March 2014, as part of its investigation into the employee's charge, the EEOC sought information from Day & Zimmerman NPS, Inc. ("DZNPS"), including the names and addresses of other electricians who worked for DZNPS at Millstone in the fall of 2012. Three months later, in June 2014, before responding to the EEOC, DZNPS sent a letter to 146 members of Marsh's union, identifying him by name and disclosing that he filed a disability discrimination charge, his medical restrictions and the accommodations he requested. The letter further informed the addressees that they did not have to speak with an EEOC investigator, and indicated that

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[84] *Id*. at *14, 15.
[85] No. 15-cv-01416(VAB), 2016 WL 1449543 (D. Conn. April 12, 2016).
[86] *Id*. at *1.

they could have the defendant's counsel with them in any interview. The EEOC claimed that the letter interfered with the recipients' and Marsh's exercise of rights protected by the ADA, including the rights to communicate with the EEOC, to participate in an EEOC investigation, and to file a charge of discrimination. The EEOC also claimed that the defendant, via the letter, retaliated against Marsh.[87]

Conciliation failed and the EEOC brought suit. DZNPS moved to dismiss for failure to state the EEOC's ADA claims. Judge Bolden denied the motion. As to the retaliation claim, Judge Bolden observed:

> To plead a retaliation claim sufficiently in an employment discrimination context, the Second Circuit has held that "the plaintiff must plausibly allege that: (1) defendants discriminated – or took an adverse employment action – against him, (2) 'because' he has opposed any unlawful employment practice."[88]

Judge Bolden then held that at this pleading stage it could not be said as a matter of law either that the letter was an adverse employment action, or that it was not sent because the employee filed a charge of discrimination. First, an adverse action in the retaliation context is defined more broadly than in the discrimination context. Thus, in the retaliation context, "the plaintiff must show that the action 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'"[89] When, as here, "an employer disseminates an employee's administrative charge of discrimination to the employee's colleagues, a reasonable factfinder could determine that such conduct constitutes an adverse employment action."[90]

The court also rejected DZNPS's argument that it could not have retaliated against Marsh because the letter was sent some seventeen months after his charge was filed. The

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87 *Id*.

88 *Id*. at *3, quoting Vega v. Hempstead Union Free Sch. Dist., 801 F. 3d 72, 90 (2d Cir. 2015).

89 *Id*. at *3, quoting Lewis v. Boehringer Ingelheim Pharm., Inc., 79 F. Supp. 394, 413 (D. Conn. 2015)(internal citation omitted).

90 *Id*.

court observed that the relevant time period was when the letter was sent in relation to the EEOC's request for information, here just a few months later. Thus, the first opportunity to retaliate against the charging party, who had been discharged before he ever filed with the EEOC, occurred when the defendant received the EEOC's inquiry.[91]

Judge Bolden also rejected the defendant's arguments on the interference claims. He agreed with the EEOC that the defendant's intent in sending the letter – allegedly "to coerce, intimidate, threaten, or interfere with these individuals' in the exercise of their rights under the ADA to communicate with the EEOC" was not a question of fact that could be resolved on the pleadings alone.[92] The court also rejected the defendant's claim that the EEOC had failed to allege that any of the recipients were actually harmed by the letter, drawing an analogy to a Second Circuit decision under the National Labor Relations Act, that "an employer's actions violate the NLRA's anti-interference provision 'if, under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees, regardless of whether they are actually coerced.'"[93]

In a final blow to the defendant's motion to dismiss the claim for damages in the EEOC's complaint, Judge Bolden held that the issue of whether compensatory and punitive damages are available for ADA interference and retaliation claims is too much in flux for decision at the preliminary motion stage and thus the jury trial demand was also preserved.[94]

In *Boutillier v. Hartford Public Schools*,[95] the plaintiff complained that she was discriminated and retaliated against by the Hartford Public Schools on the basis of her sexual orientation and physical disability. The plaintiff and her spouse were both hired to teach at Noah Webster

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91 *Id*. at *4.
92 *Id*. at *5.
93 *Id*., citing New York Univ. Med. Ctr. v. N.L.R.B., 156 F.3d 405, 410 (2d Cir. 1998).
94 *Id*. at *6, *7.
95 221 F. Supp. 3d 255 (D. Conn. 2016).

Elementary School. Shortly before school began, they were advised by the principal that overstaffing required one of them to transfer and asked them to choose which one. After her spouse was transferred, a position opened at Noah Webster and the plaintiff approached her supervisor about her spouse filling the position. The supervisor was angry, and began a campaign of hostility toward the plaintiff. Parents expressed their unhappiness that most of the behavioral problem students were placed in the plaintiff's classroom; the supervisor accused the plaintiff of improperly communicating to parents, and threatened her with discharge. The next year, the plaintiff was given a verbal warning about sharing confidential student information with parents, which the plaintiff denied. Sometime later the plaintiff suffered a medical issue causing her to miss the first half of the school year; her supervisor misled parents by telling them that the plaintiff would not be returning at all. Upon the plaintiff's return to school she was assigned to a new position that required her to create a curriculum and travel around the school, contrary to her physician's instructions. A few weeks later, her new supervisor yelled at her about a backpack, causing the plaintiff to collapse and be hospitalized. The plaintiff alleged that she was subject to further harassment, and she ultimately filed an internal harassment complaint. The situation became so bad that the plaintiff resigned her employment, and eventually filed claims with the CHRO and then suit, charging the Board of Education with sexual orientation discrimination; hostile work environment; disparate treatment based on sexual orientation; discrimination based on disability; and retaliation under the ADA, Title VII and the Connecticut Fair Employment Practices Act.

At the outset Judge Eginton found "that Title VII protects individuals who are discriminated against on the basis of sex because of their sexual orientation."[96] He relied upon the Second Circuit's decision in *Holcomb v. Iona College*,[97] which recognized discrimination because of interracial mar-

[96] *Id*. at 268.
[97] 521 F. 3d 130, 139 (2d Cir. 2008).

riage as a form of race discrimination. The court also relied upon *Price Waterhouse v. Hopkins*,[98] which found discrimination because of failure to fulfill societal expectations of women to be a form of sex discrimination, "interpreting the ordinary meaning of sex under Title VII to include sexual orientation, thereby obviating the need to parse sexuality from gender norms."[99] His analysis of these cases and similar American court decisions led Judge Eginton to reject the Second Circuit's 2000 pronouncement in *Simonton v. Runyon*,[100] and find that Title VII did entitle Boutillier to pursue claims of sexual orientation discrimination.[101]

Judge Eginton then concluded that Boutillier had sufficiently set forth facts to establish claims of disparate treatment and hostile environment based on sex. He found that there was sufficient evidence to indicate that after her initial supervisor learned she was gay she was targeted; that other gay former teachers had made similar complaints; that teachers and staff and parents witnessed unprovoked negative treatment of the plaintiff; and that the plaintiff's physician and psychologist alerted school administrators of the damage inflicted upon the plaintiff due to the hostile work environment. The court found the conduct to be sufficiently severe to indicate that the plaintiff's conditions of employment were altered by the harassment.[102]

In determining the scope of triable Title VII and CFEPA sex discrimination claims, the court also found there to be a genuine issue as to whether Boutillier's resignation was a constructive discharge. "An employee is constructively discharged where an employer intentionally crates a work atmosphere so intolerable that she is forced to quit involuntarily."[103] Judge Eginton noted that the "Unemployment Compensation Department ruled that plaintiff had quit

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98 490 U.S. 228, 251 (1989).

99 *Boutillier*, 221 F. Supp. 3d at 270.

100 233 F.3d 33, 36 (2d Cir. 2000).

101 *Boutillier*, 221 F. Supp. 3d at 269-270. Presciently, Judge Eginton noted, "the Second Circuit is likely to provide guidance on its position shortly in the case of *Christiansen v. Omnicom Group, Inc.*, 167 F.Supp.3d 598 (S.D.N.Y. 2016)." *Id.* at 270. Tune in next year.

102 *Id.* at 270-272.

103 *Id.* at 272, citing Petrosino v. Bell Atlantic, 385 F. 3d 210, 229 (2d Cir. 2004).

with good cause attributable to the employer. Whether defendant's actions were deliberate is an issue of material fact genuinely in dispute, and will depend significantly on credibility determinations."[104] The court rejected, however, Boutillier's free standing constructive discharge claim under Connecticut law on the basis that even liberal interpretation of pleading wrongful discharge could not save it since statutory remedies existed.[105]

Further, the court found there to be sufficient evidence to support Boutillier's claims of Title VII and CFEPA retaliation for complaining of sex discrimination. To establish a prima facie case, a plaintiff must show

> (1) that she participated in a protected activity, (2) that her participation was known to her employer, (3) that her employer thereafter subjected her to a materially adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action.[106]

A plaintiff must show only that she had a good faith, reasonable belief that she was opposing an unlawful employment practice to be engaged in protected activity.[107] Here the plaintiff offered evidence that she was repeatedly reassigned, forced to seek medical treatment, and her assignment to a new position was a demotion. The defendant ignored reports from her treating physicians concerning the hostile work environment. Finally, as the basis of the award of unemployment compensation, her discharge was attributable to her employer.[108]

Finally, Judge Eginton rejected Boutillier's ADA and CFEPA claims that she was discriminated against on the basis of a disability. Although she was medically prohibited from working on a number of occasions, her impairments were of too short of a duration (a few months) and were not

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[104] *Id*. at 272.
[105] *Id*. at 272-273.
[106] *Id*. at 274, citing Kaytor v. Electric Boat Corp., 609 F. 3d 537, 552 (2d Cir. 2010).
[107] *Id*. at 275.
[108] *Id*.

chronic, so that she did not, as a matter of law, suffer from a disability.[109]

In *Flowers v. Northern Middlesex YMCA*,[110] Judge Shea denied the employer's motion to dismiss an employee's Title VII and CFEPA sex-based hostile work environment and retaliation claims. The plaintiff, a housekeeper, worked for the defendant for more than thirty years. In 2004, a maintenance supervisor struck and slid his hand across the plaintiff's buttocks, and she reported the incident. Ten years went by and then the same maintenance supervisor touched the side of the plaintiff's breast and left arm. She complained again. After this incident the supervisor instructed other employees not to speak to the plaintiff, gave angry stares to the plaintiff, and assigned her additional duties, until the plaintiff suffered a stroke and was forced to resign.[111]

Judge Shea conducted an analysis of what a plaintiff must allege to make out a plausible case of a hostile work environment. A supervisor's conduct must be "'sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.'"[112] Conduct must be severe or pervasive enough to create an objectively hostile environment – i.e., a reasonable person would find the environment hostile or abusive – and the victim must subjectively perceive the environment to be abusive. Otherwise, the conduct has not actually altered the conditions of the victim's employment, a necessary prerequisite to a Title VII violation.[113] In conducting an objective analysis of the supervisor's conduct, the court must look to all the circumstances, which may include the following: "[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably

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[109] *Id*. at 273-274.
[110] No. 3:15-cv-705 (MPS), 2016 WL 1048751 (D. Conn. 2016).
[111] *Id*. at *1.
[112] *Id*. at *2, quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).
[113] *Id*.

interferes with an employee's work performance."[114] Observing that isolated incidents will not suffice to establish a hostile working environment, Judge Shea also noted that the Second Circuit has cautioned against setting the bar too high to set forth a cause of action, because "the test is whether the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse."[115] Judge Shea noted that this standard has been very difficult for trial courts to apply, and he struggled with the facts of this case. Ultimately, he concluded that Flowers had stated a claim upon which relief could be granted. The allegations of sexual harassment consisted of only two events ten years apart. On the other hand, the severity of the harassment – unconsented touching and striking in sensitive areas – was severe. Such unconsented touching is physically humiliating and intimidating, and the employee might rightly fear further abuse, affecting future interactions with the supervisor. The harassment did not, however, appear to interfere with the plaintiff's ability to perform her job. Judge Shea concluded the plaintiff "alleged barely enough to state a plausible claim of a hostile environment based on sexual harassment."[116] On these facts it is quite possible that another judge in this district might very well have come to a different result.

Judge Shea more easily found that Flowers adequately alleged a claim of retaliation. At odds with some of his colleagues in this circuit,[117] Judge Shea concluded that a supervisor's orchestrated shunning of an employee can be sufficient to constitute a materially adverse action in a retaliation claim; "fear of employer-sponsored isolation 'might well' influence an employee's decision whether to 'mak[e] or support a charge of discrimination.'"[118] Again,

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[114] *Id.* at *2, quoting Redd v. New York Div. of Parole, 678 F. 3d 166, 175 (2d Cir. 2012).

[115] *Id.* at *3, quoting Terry V. Ashcroft, 336 F. 3d 128, 148 (2d Cir. 2003).

[116] *Id.* at *5.

[117] *Id.* at *8.

[118] *Id.* at *8, quoting Burlington Northern & Santa Fe Ry. Co., v. White, 548 U.S. 53, 57 n. 8 (2006).

Judge Shea has gone out on a limb on which his colleagues might not want to join him.

In *Larocca v. Frontier Communications, Corp.*,[119] Judge Meyer granted the employer's motion for summary judgment of the plaintiff's federal and Connecticut state law age discrimination claims and his claims for promissory estoppel, negligent and fraudulent misrepresentation. All the claims were based on the 58-year-old plaintiff's not being offered another position in the company when his group's work transferred to another facility of the company out of state. Other employees within his group found positions with the company, and individuals were hired from outside the company, including at least one individual outside the protected class. While Judge Meyer found that the plaintiff was minimally qualified for positions he sought, and that others outside the protected class were hired, he found that the company articulated legitimate non-discriminatory reasons for not selecting the plaintiff (his lack of a degree), and that the plaintiff did not identify sufficient evidence to suggest there were genuine issues of fact on whether the employer's reasons were pretextual. Judge Meyer found persuasive the following: (1) the plaintiff had been 48 years old when hired, and in his mid-50's when promoted; (2) the decision makers who did not offer him a new position with the company were in their 50's;[120] (3) a man of very similar age was hired from the outside in the relevant time period;[121] and (4) the company was entitled to prefer applicants with a college degree for each of the alternative positions plaintiff sought.[122] Evidence of the plaintiff's marginally higher performance ratings than some colleagues who were selected for alternative jobs and his subjective contention that he was a better worker than one in particular were not sufficient to move the dial, particularly when all but one of the

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[119] No. 3:13-cv-01872(JAM), 2016 WL 74393.

[120] "Courts have recognized that an allegation that a decision is motivated by age animus is weakened when the decision makers are members of the protected class." *Id.* at *3.

[121] "The fact . . . severely undermines any plausible inference that the company was out to discriminate against plaintiff on the basis age." *Id.* at *4.

[122] *Id.* at *3.

plaintiff's coworkers were in the ADEA protected range.[123]

Larocca's state law tort claims were all based on statements by the company management around the time of announcement of the plaintiff's group's demise that "no one should be worried" and "there is plenty of work in Stamford" and his subsequent disappointment in not securing alternate placement in the company. The court found the statements were too indefinite to support promissory estoppel, and there was no evidence of falsity at the time of their utterance, let alone knowledge or a duty to know of such falsity, or of the employer's intent to induce reliance.[124] No part of the case survived.

The issue in *Pawlow v. Department of Emergency Services and Public Protection*,[125] was whether the State Police had failed to accommodate a trooper's need to express breast milk following her return to work from maternity leave. She suggested she could use her breast pump in the troop barracks or in the resident trooper's office. A sergeant advised her to go home to pump and to advise the dispatcher that she was on a break so that someone else could respond to a call. On one occasion she was called to respond during a pumping break, rushed to respond and had to explain her tardiness to fellow troopers. On two occasions Pawlow was out of her regular location and had no place to pump. Once she attended training at the police academy, where the only area available was the women's locker room, which had no lock on the door. The other occasion the plaintiff was training at the gun range, which was equipped with only a "porta potty," and one had to ask an employee to vacate a work area for her to use. The plaintiff claimed that she suffered emotional distress, and that the irregularities as to when she could pump caused a diminished production of milk, which led her to stop breast feeding.[126]

Shortly after her request for pumping accommodation on return from leave, a sergeant informed her that her eye-

[123] *Id.* at *4.
[124] *Id.* at *5.
[125] 172 F. Supp. 3d 568 (2016).
[126] *Id.* at 570-572.

glasses were against policy as expressed in the operations manual because they did not match the uniform. In fact, the manual contained no such policy, and the eyeglasses were the same as she had worn before maternity leave. She was given a directive to change her glasses, which she did not follow, and about which she filed a grievance. Eventually the order to change her glasses was countermanded. She never stopped wearing them. She received a negative "Trooper Performance Observation Report" for ignoring the order not to wear the glasses.

The court found these allegations insufficient to support Title VII sex discrimination claim because they do not allege an adverse employment action. At most, the allegations of failures in accommodating her need to pump breast milk amounted to an inconvenience. The allegations of the complaint did not indicate that Pawlow protested the arrangements made, only that she inquired as to how she should inform the dispatcher that she would be unavailable.[127] Neither did the allegations about the eyeglass matter pass muster. She was accused of insubordination in failing to change her eyeglasses and given a negative performance report. However, the complaint failed to indicate how these events had any effect on her employment.[128]

Pawlow's claims under the FLSA's breast feeding provision, the CFEPA and Connecticut's own breast feeding accommodation statute all were dismissed on the grounds that the state has not waived its Eleventh Amendment immunity to these claims.[129]

2. Fair Labor Standards Act Cases

Consistent with the trend nationwide, the Connecticut District Court judges decided an increased number of cases arising under the Fair Labor Standards Act (FLSA) in 2016. The case of *Darowski v. Wojewoda*[130] contains a useful dis-

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127 *Id*. at 575-576.
128 *Id*.
129 *Id*. at 576-578.
130 No. 3:15-cv-00803 (MPS), 2016 WL 4179840 (D. Conn. Aug. 7, 2016).

cussion on what must be pled to establish enterprise coverage under the Act. Judge Shea was required to determine whether the defendant, a horse-boarding facility in Newtown, was an "enterprise engaged in commerce," as required by 29 U.S.C. Section 203(s)(1)(A). Noting that a majority of courts require that there must be at least two employees engaged in commerce, Judge Shea noted the lack of such an allegation in the complaint. Judge Shea further noted that the plaintiff failed to sufficiently allege that the defendant's "business generated at least $500,000 in gross annual revenue", another requirement in order to establish enterprise coverage.[131] Even if an employee does not have knowledge about his employer's annual revenues, he still must plead facts sufficient "to support an inference about this figure, such as the number of horses at the facility, the number of clients, served, or pricing information about the services offered."[132] Here the court found insufficient the allegation that the facility had 30 acres of land and housed more than one horse and provided services for multiple clients.

Judge Shea then examined whether the plaintiff was individually "engaged in commerce", another possible method of establishing coverage under the Act. In order to establish such coverage, an employee's work "must be 'directly and vitally related to the functioning of an instrumentality of facility of interstate commerce . . . rather than isolated local activity.'"[133] Thus, "'[a]s a basic rule, if [the plaintiff] did not have any contact with out-of-state customers or businesses, he cannot be individually covered under the FLSA.'"[134] Judge Shea found insufficient allegations that the plaintiff used tools that were shipped from out-of-state, or gave feed to the horses that came from out-of-state. The allegation that he provided local services to out-of-state clients was not qualifying. The plaintiff's claim was saved from dismissal, nevertheless, based upon the

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[131] *Id*. at *6, *7.
[132] *Id*. at *7.
[133] *Id*. at *7, quoting Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 429 (1955).
[134] *Id*., quoting Ethelberth v. Choice Sec. Co., 91 F. Supp. 3d 339, 354 (E.D.N.Y. 2015).

"thin" allegations from which it could be inferred that the plaintiff "regularly performed work related to . . . [the] transportation [of horses], such as loading the horses onto trailers and otherwise preparing them for shipment, and thus was part of interstate commerce, relying upon a line of cases that held that "employees 'engaged in commerce' where they care for animals that are later transported to other states."[135]

The case also contains a useful discussion of when the statute of limitations for claims may be tolled under the overtime wage provision of the FLSA and the overtime and minimum wage provision of the Connecticut Minimum Wage Act. The court held that the limitations period under both statues may be tolled at the court's discretion, after considering "whether the plaintiff (1) has acted with reasonable diligence during the period he seeks to have tolled, and (2) has proved that circumstances are so extraordinary that the doctrine should apply."[136] Among the factors the court considered are whether the defendant posted adequate notice of the worker's wage rights; whether the plaintiff established that he did not learn of such rights through other means; whether the employee has difficulty speaking or understanding English; and whether the defendant provided the plaintiff with a record of hours worked.[137] Having found the allegations sufficient to suggest that the plaintiff acted with reasonable diligence, Judge Shea equitably tolled the running of the statute of limitations under both Acts.

Judge Chatigny considered whether the plaintiffs adequately alleged a joint employer relationship under the FLSA in *Grettler v. Directv, LLC*.[138] The plaintiffs were satellite television installation technicians whose primary employer was MasTec, part of a nationwide corps of service technicians maintained by DIRECTV. They were compensated pursuant to a piece-rate scheme used throughout DIRECTV's provider network, but "were not paid for certain

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[135] *Id*. at *9.
[136] *Id*. at *11.
[137] *Id*. at *12.
[138] No. 3:14-cv-1052(RNC), 2016 WL 1305105 (D. Conn. March 31, 2016).

work necessary to perform their jobs, such as assembling satellite dishes, driving to job assignments and obtaining supplies."[139] The plaintiffs alleged that these payment practices violated federal and state wage and hour laws and Connecticut statutes on wage payment and deductions from wages.[140]

"Whether an employment relationship exists under the FLSA depends on the 'economic reality of a particular employment situation,' which courts in this Circuit analyze by looking to a series of formal and functional control factors."[141] Thus, the allegations of a complaint "are sufficient if plaintiffs have plausibly alleged that the 'economic reality' of their arrangement with the defendants constituted an employment relationship."[142] The plaintiff need not, at the pleading stage against one joint employer, identify or make allegations about the plaintiff's relationship with the other employer.[143]

Judge Chatigny nevertheless found that plaintiffs failed to allege viable federal minimum wage claim. (The Connecticut minimum wage claims fell on statute of limitations grounds.) Each complaint contained a workweek estimate of the amount earned by each plaintiff, which, "taken as true, show that each plaintiff was compensated at a rate above the minimum wage in any given workweek."[144] Plaintiffs must allege more than a "sheer possibility" that they were paid below minimum wage in any given work week;[145] they "'must at minimum identify a single week within the limitations period in which they earned a rate below the minimum wage to state a viable minimum wage claim.'"[146] The surviving claims were the State wage payment and deduction claims.[147]

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[139] *Id.* at *1.
[140] *Id.*
[141] *Id.* at *2, quoting Barfield v. New York City Health & Hosps. Corp., 537 F. 3d 132, 142 (2d Cir. 2008).
[142] *Id.*
[143] *Id.*
[144] *Id.* at *4.
[145] *Id.* at *5.
[146] *Id.*, quoting Cooper v. DIRECTV, No. 2:14-cv-08097-AB, slip op. at 5-7 (C.D. Cal. May 21, 2015).
[147] *Id.* at *5.

In *Morales v. Gourmet Heaven, Inc.*[148] Judge Bryant granted summary judgment under both the FLSA and the Connecticut Minimum Wage Act ("CMWA") to plaintiffs who were not paid for all hours worked. The judgment is significant in a number of areas. First, Judge Bryant also found that an individual defendant, Chung Cho, the President and sole owner of the defendant grocery, was personally liable for the judgment, because he was responsible for all operations of the business, including hiring and firing employees, making wage payments, and keeping wage records.[149] Mr. Cho paid his employees in cash, did not post the required notices of wage and hour rights or inform his employees of those rights, warned them not to speak to the Department of Labor about their wages, and defrauded immigration workers.[150]

Judge Bryant found that the defendants failed to raise a statute of limitations defense, and given the defendants' conduct she declined to raise it *sua sponte*.[151] In addition, and importantly, she concluded that the defendants failed to provide any evidence to indicate that they acted in good faith, and, accordingly, she determined that the plaintiffs were entitled to double damages.[152] She also awarded, for the first time in this district, double liquidated damages to the plaintiffs under both the FLSA **and** the CMWA.[153]

In *Kinkead v. Humana, Inc.*,[154] Judge Meyer was required to determine whether a Court of Appeals decision should be given retroactive effect. In 2013 the U.S. Department of Labor used its rulemaking power to provide that third party employed workers who provided home care companionship services to the elderly or disabled were no longer exempt from the overtime requirements of the FLSA. In 2014 the U.S. District Court for the District of Columbia vacated the rule, but in 2015 the D.C. Circuit reversed, con-

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148 No. 3:14-cv-01333(VLB), 2016 WL 6996976 (D. Conn. November 29, 2016).
149 *Id.* at *5.
150 *Id.* at * 1, *3.
151 *Id.* at *8-9.
152 *Id.* at *12.
153 *Id.* at *13.
154 206 F. Supp. 3d. 751 (D. Conn. 2016).

cluding that the new rule was grounded in a reasonable interpretation of the FLSA. *Home Care Ass'n of Am. v. Weil*.[155] During the period of time that the District Court's decision remained valid, the defendant did not pay overtime compensation to the plaintiff. Judge Meyer determined that the defendant was responsible for paying overtime during the period of time that the District Court's decision remained in effect, applying "the well-established rule that judicial decisions are presumptively retroactive in their effect and operation."[156] Judge Meyer further rejected the defendant's argument that it had a right to rely upon the District Court's ruling in such a manner as to justify a non-retroactive application of the Circuit Court ruling.[157]

Whether assistant store managers at Ocean State Jobbers were exempt as "executives" from the overtime requirements of the FLSA and state law was the issue for trial in *Morrison v. Ocean State Jobbers, Inc.*[158] Judge Thompson resolved various evidentiary issues raised by the plaintiffs' motions *in limine* addressed to the question of whether the plaintiffs' primary duty was management of the enterprise or of a department of the company. He determined (1) that evidence that the named plaintiff had filed a discrimination claim regarding his discharge from Ocean State and misclassification claims against other employers was not admissible; (2) that evidence of non-salary benefits provided to assistant store managers but not to others was admissible on the issue of whether the defendant had an incentive to misclassify them because of the cost to the company of salary and benefits; and (3) that evidence that management did not know the assistant store managers spent much of their time "pushing freight", contrary to management's expectations, was admissible on the issue of the exemption as well as the issue of willfulness and liquidated damages.[159]

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155 799 F.3d 1084 (D.C. Cir. 2015).
156 206 F. Supp. 3d at 754.
157 *Id.*
158 180 F. Supp. 3d 190 (D. Conn. 2016).
159 *Id.* at 193-194.

3. Motions to Remand

In *Kolpinski v. Rushford Center, Inc.*,[160] the plaintiff claimed that he was discharged because of his speech and whistleblowing report concerning his employer's claimed illegal and unethical business practices. He brought his suit in state court, arguing his discharge violated General Statutes Sections 31-51q and 31-51m. The employer removed the case to the District Court, and the employee moved to remand.

Judge Underhill set forth the test to determine whether a district court may consider a state law cause of action that raises a federal issue:

> '[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress . . . .' A state law claim may only be the basis for federal-question jurisdiction if 'all four of these requirements are met . . . .'[161]

In order to satisfy the "necessarily raised" element, the plaintiff's claim must be "affirmatively 'premised' on a violation of federal law."[162] Where, however, "'the plaintiff can get all the relief he seeks just by showing [a violation of state law], without proving any violation of federal law,' the claim does not belong in federal court."[163]

Judge Underhill granted the plaintiff's motion to remand, noting that the plaintiff based his claim solely on a violation of the Connecticut Constitution, and not the U.S. Constitution. Therefore, his right to relief depended "solely on his ability to prove a violation of a state law that is tied to an underlying state constitutional right."[164] Judge Underhill observed that the plaintiff was not making a

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[160] No. 3:15-cv-1267(SRU), 2016 WL3919798 (D. Conn. July 18, 2016).
[161] *Id*. at *2, quoting Gunn v. Minton, 568 U.S. 251, 133 S. Ct. 1059, 1065 (2013).
[162] *Id*., quoting New York ex rel. Jacobson, 824 F.3d 308, 315 (2016).
[163] *Id*. (internal citations omitted).
[164] *Id*. at *3.

claim under the First Amendment to the U.S. Constitution; therefore, it was unnecessary to evaluate the scope of the First Amendment. In so holding, Judge Underhill disagreed with other decisions in this district that have held "that all section 31-51q claims necessarily raise a federal question."[165] Thus, a plaintiff wishing to remain in state court may plead only state law claims, even when federal claims are available.[166]

Applying the same analysis to determine whether a claim brought in state court originally raised a federal issue, Judge Bolden remanded to state court the case of *Cutillo v. Wellmore Behavioral Health*.[167] The plaintiff claimed that she was fraudulently encouraged to apply for "a student loan repayment program operated by the federal government, for which she was not eligible."[168] Although a federal program allowing employees to receive money towards outstanding student loan debt was implicated, that statute did not authorize a private party to bring suit, and the resolution of the plaintiff's claims was not dependent "on the interpretation of federal law."[169] Rather, the issue was whether her employer made misrepresentations to her, and whether those misrepresentations caused her injury.[170]

III. Connecticut State Cases

A. *Connecticut Supreme Court*

Perhaps the most important decision of the Connecticut Supreme Court in 2016 was issued at the very end of the year. In *Tomick v. United Parcel Service, Inc.*,[171] the court, affirming the ruling of the Appellate Court,[172] ruled that

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[165] *Id*. at *4. *Contra*, Ting v. University of Bridgeport, 2011 WL 2222309, at *4 (D. Conn. June 7, 2011).

[166] *Id*. at *5.

[167] No. 3:15-cv-01174(VAB), 2016 WL 3976543 (D. Conn. July 22, 2016).

[168] *Id*. at *1.

[169] *Id*. at *6.

[170] *Id*.

[171] 324 Conn. 470, 153 A. 3d 615 (2016).

[172] 157 Conn. App. 31, 115 A. 3d 1143 (2015), discussed in Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 Conn. B. J. 141, 177-78 (2016).

General Statutes Section 46a-104, does not authorize "an award of punitive damages, in addition to attorney's fees, as a remedy for discriminatory practice under the Connecticut Fair Employment Practice Act".[173] Relying upon its earlier decision in *Ames v. Commissioner of Motor Vehicles*,[174] the court confirmed that before an award of punitive damages is available, there must be "explicit statutory language to support" it.[175] Section 46a-104 does not expressly authorize punitive damages, but only authorizes "'legal and equitable relief . . . .'"[176] The court rejected the plaintiff's argument that the legislation did not exclude the possibility of such an award, finding a number of examples that when the legislature wants to make punitive damages available it has done so expressly.[177]

In a vigorous dissent, Justice Palmer, joined by Justice McDonald, argued that the statute should be liberally construed in favor of employees,[178] and that awarding punitive damages is consistent not only with prior cases which permitted the Commission on Human Rights and Opportunities to award "'personal compensatory damages' such as for emotional distress",[179] but also with Title VII of the Civil Rights Act.[180]

In the 2015 Survey[181] we reported the Appellate Court's decision in *Comm'n on Human Rights & Opportunities v. Echo Hose Ambulance*,[182] a case of first impression in which the Appellate Court adopted the Second Circuit's "remuneration test" to determine whether an individual was an employee for purposes of the Connecticut Fair Employment Practices Act (CFEPA). From that decision the Supreme

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[173] 324 Conn. at 472.
[174] 267 Conn. 524, 839 A. 2d 1250 (2004).
[175] *Tomick*, 324 Conn. at 481).
[176] *Id*.
[177] *Id*. at 483.
[178] *Id*. at 487.
[179] *Id*. at 490, citing Commission on Human Rights & Opportunities v. Board of Education, 270 Conn. 665, 685-686, 855 A. 2d 212 (2004).
[180] *Id*. at 495, citing Commission on Human Rights & Opportunities v. Echo Hose Ambulance, 322 Conn. 154, 160, 140 A.3d 190 (2016).
[181] Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 CONN. B. J. 141, 178-79 (2016).
[182] 156 Conn. App. 239, 113 A. 3d 463 (2015).

Court accepted certification, and affirmed.[183] The claimant, an unpaid volunteer, alleged the ambulance company and the city of Shelton had discriminated against her on the basis of her race and color and retaliated against her for complaining about it. The court observed that "the remuneration test arose to address circumstances in which, in contrast to the employee versus independent contractor situation, it was not clear that the putative employee had been 'hired' in the first instances, and accordingly, approximated the conventional master-servant relationship."[184] Where utilized, the test

> instructs courts to 'conduct a [two step] inquiry by requiring that a volunteer first show remuneration as a threshold matter before proceeding to the second step – analyzing the putative employment relationship under the [common-law] agency test. Remuneration may consist of either direct compensation, such as a salary or wages, or indirect benefits that are not merely incidental to the activity performed.'[185]

The court further reasoned that the remuneration test made the interpretation of CFEPA complementary to interpretations of Title VII in the Second Circuit, and it seeks to resolve at the outset the factual question of whether there is a hiring, a fact assumed by the right to control test.[186] The Court further relied upon Public Act 15-56, a 2015 statute enacted after the Appellate Court's ruling, which extended to interns the protections of CFEPA.[187] The court ultimately concluded that the volunteer failed to meet the remuneration test, as she received neither wages nor benefits in lieu of wages, and determined that she could not bring a claim under CFEPA.[188]

In *Standard Oil of Connecticut, Inc. v. Administrator,*[189]

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[183] 322 Conn. 154, 140 A 3d 190 (2016).
[184] *Id*. at 161.
[185] *Id*. at 161-162, quoting Juino v. Livingston Parish Fire District No. 5, 717 F. 3d 431, 435 (5th Cir. 2013).
[186] *Id*. at 162-163.
[187] *Id*. at 163.
[188] *Id*. at 166.
[189] 320 Conn. 611, 134 A. 3d 581 (2016).

Justice Zarella, writing for the majority in a 4-3 decision, utilized the ABC test to conclude that installers and technicians of home heating and alarm systems were independent contractors, and not employees of Standard Oil. Justice Zarella detailed the history of the court's analysis of whether an individual was an employee or an independent contractor for purposes of the Unemployment Compensation Act. As a reminder, an individual who provides services for another is deemed to be an employee unless it is shown

> that (I) such individual has been and will continued to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .[190]

Applying this test Justice Zarella relied upon the following factors to conclude that the technicians and installers were independent contractors and not employees:

- Standard Oil did not own the tools, machinery or heavy equipment necessary to install the heating systems or remove existing tanks;
- Standard Oil entered into contracts with the installers/technicians, who were individually licensed in accordance with state law and had their own businesses or worked through self-employment;
- The contracts provided for the installers/technicians to exercise their own independent judgment;
- The installers/technicians were free to accept or reject any assignment;
- The installers/technicians used their own equipment

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[190] *Id*. at 616.

to complete a project;

- Standard Oil did not provide the installers/technicians an employee handbook or provide training to them;
- Compensation was made on the basis of a set rate per piece of work; and
- The installers/technicians submitted invoices, which is usually done by independent contractors.[191]

Justice Zarella further concluded that the performance of duties at customers' homes was performance outside of all Standard Oil's places of business. He reasoned (1) that Standard Oil did not exercise control over the places were the work was performed – customers' homes; and (2) it makes no sense to conclude that a customer's home is someone else's principal place of business, when that enterprise has no office or interest in that home.[192]

In *Geysen v. Securitas Sec. Services USA, Inc.*,[193] the issue before the court was "whether an at-will employment agreement, providing that an employee's commission will not be paid unless the employer has invoiced commissionable amounts to the client prior to the employee's termination, is contrary to public policy and a violation of General Statutes Section 31-72."[194] Writing for a unanimous court, Chief Justice Rogers concluded that such an agreement did not violate public policy.

Securitas, a security services company, employed the plaintiff as a business development manager, who worked on a commission basis soliciting new business from prospective and existing customers. The plaintiff executed an agreement that provided that commission would be paid only after work was performed and invoiced to the client, and further provided that employment was at-will. Once invoiced, the plaintiff was not required to perform any additional work, but was entitled to commission payments.

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191 *Id*. at 632-635.
192 *Id*. at 655-657.
193 322 Conn. 385, 142 A.3d 227 (2016).
194 *Id*. at 387-388.

Because the plaintiff's employment was terminated before certain jobs were invoiced, the defendant refused to pay the plaintiff a commission on those matters.

Geysen sued, claiming, *inter alia*, that such an agreement was contrary to the requirements of General Statutes Section 31-72, and was therefore contrary to public policy. The court disagreed. Chief Justice Rogers first recalled that the court had previously

> held that Section 31-72 'does not embody substantive standards to determine the amount of wages that are payable but provides penalties in order to deter employers from deferring wage payments once they have accrued . . . . [T]he wage statutes, as a whole, do not provide substantive rights regarding *how* a wage is earned; rather, they provide remedial protections for those cases in which the employer-employee wage agreement is violated.' [195]

The Chief Justice reiterated that "our wage payment statutes expressly leave the timing of accrual to the determination of the wage agreement between the employer and [the] employee."[196] The Chief Justice then, upon reviewing the parties' agreement, concluded that commissions not invoiced prior to the termination of the plaintiff's employment "were not 'due' within the meaning of Section 31-71b(a) because there was a condition precedent to their accrual that had not been satisfied."[197] Accordingly, there was no violation of the wage statutes.[198]

In last year's Survey[199] we reviewed the court's decision in *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*,[200] in which the Supreme Court held that the Superior Court should consider four factors in determining whether an arbitration award

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[195] *Id*. at 393-394 (emphasis in original), quoting Mytych v. May Dept. Stores Co., 260 Conn. 152, 162, 793 A.2d 1068 (2002).

[196] *Id*. at 395, quoting Mytych v. May Dept. Stores Co., 260 Conn. 152, 164-165, 793 A. 2d 1068 (2002).

[197] *Id*. at 395-396.

[198] *Id*. at 398.

[199] Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 CONN. B. J. 141, 170-72 (2016).

[200] 316 Conn. 618, 114 A. 3d 144 (2015).

involving public employees violates public policy. Those factors include:

> (1) any guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant's conduct; and (4) whether the grievant is incorrigible.[201]

The court was required to apply that four-factor test to the question of whether public policy requires the termination of employment of a state employee who is caught smoking marijuana during his working hours, in *State v. Connecticut Employees Union Independent*.[202] The grievant was employed at the UConn Health Center as a skilled maintainer. He was caught smoking marijuana during his work shift, and surrendered two bags in his possession, weighing a total of three quarters of an ounce. He was discharged and told he had violated the Health Center's "rules of conduct, alcohol abuse and drug-free workplace policy, and smoke-free workplace policy, and that the incident was considered to be serious."[203] The Health Center also explained that the night shift maintenance worker's unsupervised access to virtually the entire facility made his position one requiring greater trustworthiness than his offense permitted.

After hearing on Connecticut Employees Union Independent's grievance of the discharge, an arbitrator reduced the discipline to a 6-month suspension without pay, and returned the grievant to work on a "last chance" basis and subject to random drug and alcohol testing for one year. The arbitrator agreed that the grievant had violated the Health Center's policies, and rejected the grievant's claims that he had inadvertently brought the marijuana to work. However, because of the grievant's prior positive work record, his pursuit of therapy for anxiety and depression prior to the incident (responding to a cancer scare and mar-

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[201] *Id*. at 634.
[202] 322 Conn. 713, 715, 142 A. 3d 1122 (2016).
[203] *Id*. at 717.

ital problems he had recently experienced), and his ineligibility for unemployment compensation, the arbitrator was persuaded that the grievant understood the severity of his offense. Further, the arbitrator concluded that the conduct was not such a breach of trust that returning him to the workplace would create a danger to others or preclude him from being a satisfactory and productive employee.[204] A Superior Court judge deciding cross motions to vacate and confirm the award found it violated the public policy of the state against marijuana use, gave insufficient recognition to the safety and security concerns the misconduct raised and dangerously indicated life stress in a public employee's life excused flouting anti-drug rules and laws.[205] The order vacating the award was appealed to the Supreme Court.

Applying the *Burr Road* factors, the Supreme Court agreed with the arbitrator and reversed the Superior Court. Reviewing the state's drug-free workplace policy and the federal Drug-Free Workplace Act of 1988, state regulations making it clear that the use of illegal drugs in the workplace is misconduct warranting discipline, the court noted that none of these sources required discharge from employment for violation of anti-drug rules or laws and so that this factor militated against a conclusion that the arbitrator's return to work award violated public policy.[206]

The court then evaluated whether the grievant could be trusted to perform his responsibilities, such as changing heating, ventilation and air conditioning filters on a hospital roof, in an acceptable manner. The court concluded that "there is no indication that performance of his job duties substantially implicates public safety."[207] The grievant's job did not involve contact with patients or medical equipment, nor did his job place him near children.[208] So, the second *Burr Road* factor also weighed against vacating the arbitrator's award.[209]

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[204] *Id*. at 719.
[205] *Id*. at 722.
[206] *Id*. at 727 and 728.
[207] *Id*. at 730.
[208] *Id*. at 731.
[209] *Id*. at 733.

Evaluating the "egregiousness" of the grievant's offense, the court noted that the grievant's misconduct was significant, but it did not result in harm to person or property; the risks were only to his own safety. The court also noted that the consequences resulting from the incident "had a sobering impact on the grievant" and likely would dissuade his colleagues from aping his misconduct. The court found this third *Burr Road* factor neutral.[210]

Finally, the court did not find the grievant to be so incorrigible that discharge was required. The court noted the arbitrator had considered the risk of the grievant's engaging in this conduct in the future to be small, given his fifteen-year employment history with no prior discipline, favorable performance evaluations, his participation in therapy and his amenability to rehabilitation.[211] "By the arbitrator's estimation, the grievant's personal qualities and overall record indicate that he is a good candidate for a second chance." [212]

Three of the four *Burr Road* factors weighed in favor of the court's conclusion that the award did not violate public policy and reversal of the Superior Court's vacatur.[213] Justice Espinosa's reluctant concurrence includes an analysis of *Burr Road's* progeny and urges reconsideration of its standards as unrealistic and unworkable.[214]

In *Balloli v. New Haven Police Department*[215] the court, by a 4-3 majority, concluded that a police officer was entitled to worker's compensation benefits when he injured his back bending over to pick up car keys he dropped as he was about to enter his car parked on the street to go to work. The court was called upon to determine the applicability of a special rule for police officers and firefighters. To be compensable, an injury must occur in the course of employment. For most employees, the commute does not qualify, and the

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[210] *Id.* at 734-35.
[211] *Id.* at 737.
[212] *Id.* at 738.
[213] *Id.*
[214] *Id.* at 740-757.
[215] 324 Conn. 14, 151 A. 3d 367 (2016).

course of employment does not start until the employee reports for work. Pursuant to General Statutes Section 31-275(1)(A)(i), however, a police officer or firefighter's course of employment begins as soon as he departs from his "place of abode." Holding that the statute should not be read narrowly to restrict the right to benefits because of its humanitarian and remedial purposes, the majority concluded that a place of abode "does not include public areas that may be adjacent to a person's property, such as sidewalks or streets."[216]

The dissent scoffed at the majority's conclusion: "Although the majority's determination that an employee's place of abode terminates at the employee's own property line has the superficial appeal of a bright line rule, that line is unmoored to the realities of employees' varied circumstances."[217] The dissent concluded that the worker's compensation commissioner reasonably concluded that the police officer's commute had not yet begun when he sustained his injury, irrespective of whether his car was parked on the street or in his driveway, and to deny him benefits was consistent with the purpose of the statute "to exempt police officers' commutes from the coming and going rule."[218]

B. *Other State Cases*

The Appellate Court's decision in *Morrissey-Manter v. Saint Francis Hosp. and Medical Center*,[219] contains a useful summary of what a plaintiff who alleges the existence of an implied contract of employment must demonstrate in order to avoid summary judgment. The plaintiff worked as a nurse at the hospital for thirty-two years. While working in the emergency room one day, she cut a portion of a plastic covering the end of a pacer wire, in violation of hospital policy, in order to make the wire fit into a pacer box. This action may have saved the patient's life. Nevertheless, she

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[216] *Id*. at 23.
[217] *Id*. at 36.
[218] *Id*. at 38.
[219] 166 Conn. App. 510, 142 A. 3d 363 (2016).

was discharged a few days later for violating hospital policy, as a result of compromising the wire, and because what she did was not within the scope of practice of a registered nurse.[220]

The plaintiff claimed that she had an implied contract of employment that could be terminated only for cause, and that she was not subject to the hospital's at-will employment policy codified in its employee handbook that had been in existence for more than twenty years, and of which she acknowledged receipt. She claimed that "she was not an at-will employee because she was subject to progressive discipline, received merit pay and annual job performance, reviews, participated in the 401(k) retirement plan, received verbal assurances of continued employment, and was referred to as 'a team player and devoted to her job.'"[221]

The court found this evidence insufficient to survive summary judgment, as these facts did not establish a meeting of the minds as to the existence of a contract.[222] First, the court cited to its own earlier decision in *Gagnon v. Housatonic Valley Tourism District Commission*,[223] where it held that "periodic reviews, setting dates at which there would be salary increases, setting long-term benefits and the way other employees were treated . . . " were insufficient to establish a contractual commitment by the employer.[224] Second, relying upon the Supreme Court's decision in *Gaudio v. Griffin Health Services Corp.*,[225] the court reinforced that an employer protects itself against contract claims based upon statements made in personnel manuals by "'(1) eschewing language that could reasonably be construed as a basis for a contractual promise; and/or (2) including appropriate disclaimers of the intention to contract . . . .'"[226] Here the hospital did just that.

The plaintiff also claimed that discharging an employee

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220 *Id.* at 515.
221 *Id.* at 518.
222 *Id.* at 521.
223 92 Conn. App. 835, 843, 888 A. 2d 104 (2006).
224 *Id.*
225 249 Conn. 523, 535, 733 A. 2d 1997 (1999).
226 *Id.*

who had saved a life was against public policy. The court refused to go along, finding that rescuing a person did not create any exception to the employment at will doctrine. Further, relying upon *Armshaw v. Greenwich Hospital*,[227] the court observed that "medical providers should have significant discretion to terminate the employment of an at-will employee who has violated hospital procedures and policies that are in place to guarantee the safety and proper care of patients."[228]

Pursuant to General Statutes Section 31-49, an employer must exercise reasonable care to provide its employees "a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work… " In *Schulz v. Auto World, Inc.*,[229] the issue before the court was whether a plaintiff stated a cognizable claim for discharge in violation of public policy as expressed in General Statutes Section 31-49 with allegations "that he observed a significant number of firearms being delivered to his workplace that presumably did not sell or service firearms, raised to his employer his concern about the presence of a significant number of firearms in the workplace [that were placed under his supervisor's desk, not secured and so accessible to employees and customers], and was thereafter discharged by his employer..."[230] Judge Elgo found persuasive California and Kansas decisions that acknowledged "the important public policy of allowing an employee to raise to its employer what the employee 'reasonably believe[s] [to] constitute a hazard to their own health or safety, or the health or safety of others [in the workplace]'…"[231] According to the complaint, the plaintiff raised concerns to the owner of the business. On the day the plaintiff spoke with the owner, the supervisor told him the owner was aware of the firearms and the plaintiff had no right to interfere with the supervisor's business. The supervisor fired the plaintiff two days later. Judge Elgo

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227 134 Conn. App. 134, 138, 38 A. 3d 188 (2012).

228 *Id*.

229 No. HHD-CV-15-6060382-S, 63 Conn. L. Rptr. 169, 2016 WL 7135040 (Conn. Super. Ct. October 25, 2016).

230 *Id*. at *4.

231 *Id*. at *5 (internal citations omitted).

found that these allegations were sufficient to articulate a discharge in violation of an important public policy, the raising of concern over firearms in the employer's workplace.[232]

Schulz also alleged that his discharge violated General Statutes Section 31-51q's ban on retaliatory discharge for exercising constitutionally guaranteed free speech rights. Defendant argued the allegations did not include the necessary element that the speech address a matter of public concern. Judge Elgo found that firearms are a matter of public concern, and that "[g]iven .... the context in which the employee's speech was made, ... speech on firearms, as a matter of law, is speech on a topic of public concern."[233] The court found that this speech was protected by both the U.S. and Connecticut constitutions. Finally, the court concluded, agreeing with a minority of other Superior Court cases, that in order to state a cognizable claim, the employee was not required to plead specific facts that the speech did not materially interfere with the employee's job performance or the employee's working relationship with his employer.[234]

Judge Robaina was also called upon to apply the Supreme Court's 2015 decision in *Burr Road Operating Company II, LLC v. New England Health Care Employees Union District 1199*,[235] discussed in last year's survey at 90 *Connecticut Bar Journal* 141, 170-172, in *Town of East Hartford v. East Hartford Police Officers' Ass'n*.[236] A police department system permits law enforcement officials access to records for law enforcement purposes. The police officer used his access for personal reasons, including to obtain the address of a former girlfriend, whom he then visited uninvited, resulting in his arrest for criminal trespass and breach of peace. After he was placed on administrative leave, the department's investigation determined that he had accessed the system and looked up information for five different personal contacts, at least once not for law enforce-

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[232] *Id*.
[233] *Id*. at *7.
[234] *Id*. at *9.
[235] 316 Conn. 618 (2015).
[236] No. HHD-CV-14-6055713-S, 61 Conn. L. Rptr. 863, 2016 WL 1265957 (Conn. Super. Ct. March 2, 2016.).

ment purposes, and that he falsely entered "training" in order to access the system. As a result, he was discharged. Following his discharge, it was found that he had used the system to collect information at least twenty-one times improperly, and he was charged with computer crimes, for which he ultimately received "accelerated rehabilitation."[237]

An arbitration panel hearing the union's grievance of the discharge concluded that the department did not prove just cause and that a lesser penalty of suspension should have been imposed. The panel found that two police dispatchers who had also improperly accessed the department's system had only been given suspensions, and that one dispatcher's use of a coworker's identity was actually worse conduct than the police officer's conduct. The panel converted the discharge to a suspension without pay.

The department applied to have the arbitration award vacated, on the grounds that it violated public policy. Applying the analysis of *Burr Road*,[238] Judge Robaina concluded that the award implicated a well-defined public policy, in as much as a police officer with access to sensitive information, the cannot violate his obligation to access sensitive information only for police purposes without also violating public policy.[239] Judge Robaina found however, that there was no public policy requiring discharge for such a violation. Judge Robaina concluded that the officer's conduct was egregious, and further that the officer's conduct caused harm to others, including his former girlfriend against whom he trespassed. Nevertheless, applying the *Burr Road* standard, Judge Robaina found that the officer was not "incorrigible" because he had been a police officer for nine years without any negative history until this issue arose. The court could not find any likelihood of recidivism, and the court concluded that the record did "not support a finding that the grievant is not amenable to discipline . . .."[240] Accordingly, Judge Robaina denied the motion to vacate.

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[237] *Id*. at *1.
[238] 316 Conn. 618, 114 A. 3d 144 (2015).
[239] *Id*. at *2.
[240] *Id*. at *3.

This decision was cited by Justice Espinosa in her reluctant concurrence in *State v. Connecticut Employees Union Independent*.[241]

In *Fasulo v. HHC Physicianscare, Inc.*,[242] the issue was whether the plaintiff could maintain a claim sounding in disability discrimination where she was unable to maintain regular, consistent and predictable attendance. The plaintiff worked for the defendant from 2006 until August 1, 2013, when she was discharged because of excessive absences from work. The plaintiff was absent from work for extended periods of time between December 2012, and the end of July 2013. The plaintiff claimed that her discharge violated the defendant's obligation to refrain from discharging her on the basis of a claimed disability and that the defendant failed to accommodate her disability under the Connecticut Fair Employment Practices Act, General Statutes Section 46a-60. The defendant moved for summary judgment. The court found that:

> A primary case of disability employment discrimination requires proof that '(1) [the plaintiff] suffers from a disability or handicap, as defined by the [applicable statute]; (2) [the plaintiff] was nevertheless able to perform the essential functions of [her] job, either with or without reasonable accommodation; and that (3) [the defendant] took an adverse employment action against [the plaintiff] because of, in whole or in part, [the plaintiff's] protected disability.[243]

Section 46a-51(15) of the General Statutes defines "Physically disabled" as "any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness . . ." The plaintiff offered evidence that she suffered from "mild to moderate spinal compressive/degenerative disc disease", which the court concluded was a permanent, and thus chronic disability. Thus, the plaintiff established the first element of the prima facie

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241 322 Conn. 713, 745.

242 No. HHD-CV-14-6054624-S, 62 Conn. L. Rptr. 422, 2016 WL 3266434 (Conn. Super. Ct. May 24, 2016).

243 *Id*. at *3, quoting Curry v. Allen S. Goodman, Inc., 286 Conn. 390 (2008).

case.[244]

However, Judge Noble concluded that Fasulo failed to offer evidence to establish a genuine issue of material fact as to whether she was able to perform the essential functions of her job, with or without a reasonable accommodation. Between December 2012 and July 2013, the plaintiff was absent from work on numerous occasions, some of which were related to her disability. She was warned on several occasions about the need to have regular attendance, with a final warning that unless she returned to duty by July 31 her employment would be terminated. When she failed to return on that day, she was discharged the following day.[245]

After noting that an essential function of a job is one "'considered fundamental to the position,'"[246] the court found that "[a]ttendance may be an essential function of a job where the employee must work as part of a team, the job requires face-to-face interaction with clients or patients, and requires the employee to work with items and equipment that are on site."[247] The court found that "the position of patient service coordinator required Fasulo to be present at work in order to interact/greet patients, and open, sort and distribute the mail. The multiple illnesses and conditions that rendered the plaintiff disabled also operated to render her unable to perform an essential function of her job, attendance at work."[248]

Fasulo failed to identify any reasonable accommodation that might have permitted her to have regular attendance. She argued that a leave of absence should have been granted to her, but failed to offer evidence as to how long a leave might be sufficient, or that she ultimately would have been able to achieve regular attendance.[249] Moreover, the duty to accommodate "'does not . . . require an employer to hold an

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[244] *Id*. at *6.
[245] *Id*. at *7-8.
[246] *Id*. at *8, quoting Scruggs v. Pulaski County, Arkansas, 817 F.3d 1087, 1092 (8th Cir. 2016).
[247] *Id*. at *8 (Internal quotations and citations omitted).
[248] *Id*.
[249] *Id*. at *10.

injured employee's position open indefinitely while the employee attempts to recover …'"[250]

In *Beck v. University of Connecticut Health Center*,[251] Judge Elgo considered whether the plaintiff was qualified for her job, with or without an accommodation for her disability, as of the date she was discharged from her employment. The plaintiff claimed that she suffered a substantial hearing loss and anxiety which prevented her from continuing to work in her position, which required her to have contact with patients both on the phone and in person. She repeatedly requested accommodations, and the Health Center attempted to accommodate her issues, providing her with hearing devices that would make it easier to hear. She ultimately needed to take leave from work unrelated to her hearing disability, and when the Health Center did not receive medical certification regarding her absence from work she was discharged.[252]

The plaintiff thereafter filed for disability benefits with the Social Security Administration. In her application for benefits she claimed that she was unable to work due to seizure disorders occurring every two to three weeks. Thus, she claimed that she could not work for reasons unrelated to her claimed hearing disability.[253] Reminding the plaintiff that in order to establish a prima facie case of employment discrimination under the Rehabilitation Act she was required to prove (1) she had a disability; (2) she was otherwise qualified for a position; (3) she was denied that position because of her disability; and (4) the employer received federal funds,[254] Judge Elgo concluded that because the Social Security Administration determined that she was disabled and incapable of working as of the time of her discharge, she could not qualify for the position. In short, she was judicially estopped from asserting that she was qualified.[255]

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[250] *Id*., quoting Parker v. Columbia Pictures Industries, 204 F. 3d 326, 338 (2d Cir. 2000).

[251] No. HHD-CV-13-6045913-S, 2016 WL 8201794 (Conn. Super. Ct. December 27, 2016).

[252] *Id*. at *5.

[253] *Id*. at *8.

[254] *Id*.

[255] *Id*. at *9, relying on Kovaco v. Rockbestos-Suprenant Cable Corp., 834 F. 3d 128 (2d Cir. 2016).

The court further found that even if the plaintiff was qualified, she failed to come forward with evidence that her discharge was solely because of her disability, as required by the Act. She failed to come forward with evidence to contradict the reason given by the employer – that she was discharged because she failed to provide medical certification to support her request for leave under the Family and Medical Leave Act.[256]

Relying upon the findings that the plaintiff was not qualified for her job at the time of her discharge, her failure to provide the requested medical certifications, and the evidence of the employer's efforts to accommodate her disability, Judge Elgo granted the Health Center's motion for summary judgment in connection with the plaintiff's claims alleging discrimination under the Connecticut Fair Employment Practices Act; failure to make a reasonable accommodation; failure to hire; and retaliation.[257]

Judge Elgo was required to determine when the protections of the Family and Medical Leave Act, 29 U.S.C. Section 2601 *et seq*., begin, in *Colagiovanni v. Valenti Motors, Inc*.[258] The FMLA provides protection from interference with the exercise of rights under the Act and protection from retaliation for exercising those rights only to eligible employees, i.e., those employees who have been employed for at least twelve months and who have worked at least 1,250 hours prior to the beginning of the leave.[259]

Eight months after beginning employment Colagiovanni notified the defendant's office manager and its service director that he had a back injury that would require surgery. He did not, however, provide the employer with notice of his intention to use medical leave pursuant to the FMLA. He was discharged from his employment before he worked the full twelve months and before he worked the necessary 1,250 hours.

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[256] *Id*. at *11.
[257] *Id*. at *12-18.
[258] No. HHD-CV-13-6046276-S, 62 Conn. L. Rptr. 101, 2016 WL 1728026 (Conn. Super. Ct. April 12, 2016).
[259] *Id*. at *2.

Colagiovanni sued, claiming he was discharged in order to deprive him of his rights to benefits under the federal FMLA. The employer moved for summary judgment, claiming that he was not entitled to the benefits or protections of the Act because he was not an eligible employee. Judge Elgo agreed, and entered summary judgment for the employer.

First, Judge Elgo concluded that there were no facts upon which a jury could find that the employer "'reasonably understood that the plaintiff would be taking FMLA leave' sometime more than four months in the future."[260] It could not be inferred that the plaintiff's notice that he needed surgery amounted to the advance notice required by the FMLA. More importantly, as a matter of law the plaintiff was not an eligible employee and the FMLA could not be interpreted to extend the protections of the Act to employees who might become eligible in the future. The court relied upon the Second Circuit case of *Woodford v. Community Action of Greene County, Inc.*,[261] in which "the court made clear that until an employee has been employed for one year and at least 1,250 hours of service, he or she is not eligible for the protections afforded by the FMLA."[262] In *Woodford* the plaintiff had worked for the employer for twelve years, but in the twelve months before the desired leave, fewer than the minimum required 1,250 hours. The Second Circuit made it clear that an employee is not eligible until he meets the minimum number of hours, and to hold otherwise would extend the protections of the Act to employees who were not eligible. Accordingly, since the plaintiff in *Colagiovanni* had neither worked the necessary 1,250 hours nor been employed for twelve months before the leave, the employee was not entitled to the protections provided by the Act.[263]

In *Richard v. Para-Pharm, Inc.*[264] Judge Calmar denied an employer's motion for summary judgment on a wrongful discharge claim, finding there were issues in dispute as to

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[260] *Id.*
[261] 268 F. 3d 51 (2d Cir. 2001).
[262] *Colagiovanni*, 2016 WL 1728026 at *3, citing *Woodford*, 268 F. 3d at 57.
[263] *Id.* at *4.
[264] No. WWM-CV-14-6008998-S, 2016 WL 5107842 (Conn. Super. Ct. August 11, 2016).

whether the discharge of the employee violated an important public policy. The plaintiff fell on a private sidewalk while delivering medical supplies from the defendant to a patient and sustained a work-related injury. The plaintiff sued the owner of the sidewalk, and her employer complained to her that the lawsuit was affecting its reputation in the community and causing it to lose business. The employer and its attorneys threatened to sue her for causing it to lose business. She was subsequently discharged, her employer citing a litany of reasons, including using her cell phone while operating the company car; refusing to pick up an oximeter; delivery of a wrong mattress to a patient's home; failing to timely provide medications to a hospice patient; and showing up late for work.[265] The employee complained that she was discharged because of her refusal to drop her lawsuit, which she claimed constituted a discharge in violation of public policy. Judge Calmar found that she must have a right to have access to the court to pursue her lawsuit, and a discharge in retaliation for exercising that right would be offensive to public policy. Accordingly, he found that there were facts in dispute as to the reason for her discharge, and the employer's motion for summary judgment was denied.[266]

Judge Calmar did, however, grant the employer's motion for summary judgment on the plaintiff's claim of intentional infliction of emotional distress. He repeated the standard of analysis set forth by the Connecticut Supreme Court in *Appleton v. Board of Education*:[267]

> It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.[268]

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[265] *Id*. at *1, *3.
[266] *Id*. at *3.
[267] 254 Conn. 205, 210, 757 A. 2d 1059 (2000).
[268] *Id*.

Moreover, liability will be found only for "conduct that exceeds all bounds usually tolerated by decent society."[269] As a matter of law Judge Calmar refused to find as sufficiently outrageous the employer's attempts to coerce plaintiff into dropping her lawsuit or the threats by its lawyers to sue her.[270]

Judge Elgo came to the same conclusion in *Darrity v. Columbia Dental, P.C.*[271] Applying the *Appleton* test she concluded that an employee who claimed that her supervisor, and thus her employer, who disclosed her highly sensitive medical procedure related to her pregnancy without a legitimate business reason did not engage in conduct that was so extreme or outrageous as to exceed the bounds tolerated in society.[272] The court also found that the plaintiff's pregnancy discrimination retaliation claim was insufficient, as the adverse employment action – a reduction in her hours and therefore a reduction in her earnings – occurred four months after her pregnancy-related medical procedure and her return to work. The court found that the employee was not still affected by her pregnancy, and there was an insufficient temporal connection between her pregnancy-related issues and the reduction in her hours.[273]

In *Spears v. Cardinal Health 200, LLC*,[274] Judge Peck found that an employee who was required to submit to hair follicle drug testing stated a claim sounding in invasion of privacy. Unlike a urinalysis test, the court concluded that the requirement of a hair follicle test "may be found to be intrusive and highly offensive to a reasonable person."[275] The court further found that the plaintiff could plead a common law claim of wrongful discharge, inasmuch as the plaintiff did not have a statutory remedy, as General Statutes Sections 31-51x and 31-51u(a) apply only to uri-

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269 *Id.*

270 *Richard,* 2016 WL 5107842 at *4-5.

271 No. HHD-CV-16-6067482-S, 2016 WL 8135397 (Conn. Super Ct. December 27, 2016).

272 *Id.* at *6.

273 *Id.* at *4.

274 No. HHD-CV-15-6063597-S, 2016 WL 5173210 (Conn. Super. Ct. August 17, 2016).

275 *Id.* at *2.

nalysis testing.[276]

The CHRO was the subject of two administrative appeals worth including in this year's summary. In *Trinity Christian School v. Commission on Human Rights and Opportunities*,[277] Judge Schuman was required to consider whether the religious school defendant was entitled to immunity from a pregnancy discrimination complaint pursuant to General Statutes Section 52-571b. In prior proceedings, the school originally moved to dismiss the charge, asserting that the employee's duties were of a religious nature, and therefore the school was immune from suit. After the CHRO hearing officer denied the motion to dismiss, the school appealed to the Superior Court. The CHRO's motion to dismiss the appeal was granted, with the court holding that the "ministerial exception" was an affirmative defense rather than a jurisdictional defense, and, therefore, an interlocutory appeal did not lie. Many months after that remand, the school moved to dismiss again, this time claiming immunity under General Statutes Section 52-571b(d), which provides, "Nothing in this section shall be construed to authorize the state or any political subdivision of the state to burden any religious belief." After six months the CHRO hearing officer again denied the motion to dismiss. The school appealed again.

Judge Schulman concluded that the statute "does not confer statutory immunity on religious institutions asserting the ministerial exception,"[278] noting that the statute does not have any of the language of an immunity statute.

The case presents a troubling history, as the original charge was filed in 2012, and Judge Schulman's 2016 decision did not provide any finality to the dispute, but merely cleared the way for a hearing at the CHRO. The case thus represents another example of why stakeholders – com-

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[276] *Id*. at *3. For the same reason, *see also* Schofield v. Loureiro Engineering, 2015 WL 3687707 (Conn. Super. Ct. May 22, 2015) discussed in Jeffrey J. Mirman, *Survey of Developments in Labor and Employment Law*, 90 CONN. B. J. 141, 183 (2016).

[277] No. HHB-CV-16-6032047-S, 62 Conn. L. Rptr. 889, 2016 WL 5339514 (Conn. Super. Ct. August 22, 2016).

[278] *Id*. at *5.

plainants, respondents, legislators – are increasingly frustrated with the procedures at the CHRO and the length of time that cases take to move through the system.

The case of *City of Hartford Police Department v. Commission on Human Rights and Opportunities*[279] further highlights problems with case processing at the CHRO. In 2011, prior to completion of probation as a police officer, the charging party was discharged for poor performance. He filed a charge with the CHRO, claiming that he was discriminated against because of his Vietnamese and Asian ancestry. After a hearing on the merits of the claim, a CHRO hearing officer in 2015, almost four years later, found in favor of the charging party, and the police department appealed.

Judge Schuman sustained the HPD's appeal and remanded the case for another hearing, finding that the hearing office erred in applying a "mixed motive" rather than a "pretext" analysis. The court observed that "'a "mixed-motive" case exists when an employment decision is motivated by both legitimate and illegitimate reasons.'"[280] In a mixed motive case the plaintiff or charging party bears the initial burden of providing enough evidence "'that the employer's decision was motivated by one or more prohibited statutory factors.'"[281] Once that burden is met, the burden of production and persuasion shifts to the employer to prove "'that it would have made the same decision if it had not taken [the impermissible factor] into account.'"[282]

In a "pretext" case, on the other hand, the McDonnell Douglas-Burdine[283] standard requires a plaintiff or charging party to prove that he is a member of a protected class (race or national origin); that he was qualified for the posi-

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[279] No. HHB-CV-156028513-S, 62 Conn. L. Rptr. 432, 2016 WL 3452061 (Conn. Super. Ct. June 1, 2016).

[280] *Id*. at *2, quoting Levy v. Commission on Human Rights & Opportunities, 236 Conn. 96, 105-109, 671 A. 2d 49 (1996).

[281] *Id*., quoting Levy v. Commission on Human Rights & Opportunities, 236 Conn. 96, 105-109, 671 A. 2d 49 (1996).

[282] *Id*. at *3, quoting Levy v. Commission on Human Rights & Opportunities, 236 Conn. 96, 105-109, 671 A. 2d 49 (1996).

[283] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

tion; and that despite his qualifications, he was discharged.[284] The burden of production, but not persuasion, then shifts to the employer to raise an issue of fact as to whether it discriminated against the charging party. Thus, while the mixed motive case shifts the burden of proof to the employer, under a pretext analysis the burden of proof always remains with the charging party.[285]

Ultimately Judge Schuman found error because the CHRO and the charging party argued before the hearing officer using the pretext model, but the hearing officer decided the case using the mixed motive model, and the employer was not given notice that the hearing officer was going to use that model and, thus, shift the burden of proof to the employer. Judge Schuman concluded that an employer is entitled to notice of the standard of analysis to be utilized.[286] He further found that the hearing officer determined that the evidence did not meet the threshold for application of the mixed-motive test," yet the hearing officer applied that test anyway.[287] Six years later, and again the case is facing another hearing.

Two opinions by Judge Tanzer in 2016 interpreting the Unemployment Compensation Act merit discussion in this year's survey. In *Certified Ambulance Group, Inc. v. Administrator*,[288] the employer appealed a decision of the Board of Review awarding benefits after finding that the employee voluntarily quit her position for good or sufficient cause attributable to the employer. The employee had filed a charge of disability discrimination with the Commission on Human Rights and Opportunities (CHRO), claiming that after returning from a medical leave she was demoted from her position of self-pay manager. After she filed her charge she went out on medical leave again. While on leave she and the employer participated in a mandatory mediation at the CHRO. The employee's physician identified a return to work

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[284] *City of Hartford Police Department*, 2016 WL 3452061 at *3.
[285] *Id*. at *4.
[286] *Id*. at *4.
[287] *Id*. at *5.
[288] No. CV-15-5016733, 62 Conn. L. Rptr. 14, 2016 WL 1443504 (Conn. Super. Ct. March 14, 2016).

date, but during the mediation the employer conditioned her return to work on a withdrawal of the CHRO charge and the imposition of a six-month probationary period, although the employer's policies provided for a probationary 90-day period only on the commencement of employment. Rather than agree to these terms, the employee quit. The court concluded that the Board of Review was correct in determining that these conditions represented a substantial change in working conditions, notwithstanding that the employment was at-will, because the six-month probationary period substantially affected her job security. The failure to meet expectations in the probationary period required dismissal, unlike a failure outside the probationary period. An individual who voluntarily leaves suitable work for good cause is eligible to receive benefits if "the individual's employer substantially changed a working condition . . . and such change had a significantly adverse effect upon the individual, or . . . the individual's employer required the individual to perform an activity which was unlawful. . ."[289] The employer's conditional offer of reinstatement violated both of these provisions.

In *Companions and Homemakers, Inc. v. Administrator*,[290] the issue was whether the employee was disqualified for receiving benefits because she was discharged for willful misconduct. The employee worked from home as a care coordinator. She used the company's laptop to perform her work, but was not provided a printer by the Company. She forwarded a company memo emailed to her to her personal email so she could print it on her home printer. She did not send it to anyone else. The company claimed that she violated the company's policy against personal use of a company computer or its email system. The evidence established that she had not been aware of the policy or that she was violating it, and she had never been warned about the policy or about similar conduct. General Statutes Section 31-236(a)(16) defines willful misconduct as "a single knowing violation of a reasonable and uniformly

[289] Regulations of Connecticut State Agencies Section 31-236-22(a).

[290] No. CV15-5016994S, 62 Conn. L. Rptr. 366, 2016 WL 3179870 (Conn. Super. Ct. May 18, 2016).

enforced rule or policy of the employer, when reasonably applied, provided such violation is not the result of the employee's incompetence." Applying the facts proven to this standard, the Board found that there was no evidence that the policy had been uniformly enforced, or that the employee was incompetent. Accordingly, the Board found the employee to be eligible for benefits, and the court agreed.

IV. Connecticut State Board of Labor Relations

The State Board of Labor Relations considered and decided seventeen prohibited practice charges after a full hearing in 2016. Of those seventeen cases, the Board dismissed the charges in fifteen of those cases. We review the two cases in which the Board found merit to the charges.

In Town of East Hartford and East Hartford Police Officers Association,[291] the Board found the Town violated the Municipal Employees Relations Act (Act) by failing to comply with an arbitration award ordering the reinstatement of a police officer. The Town discharged the officer after finding that the officer improperly used the Town's on-line teleprocessing system for personal use. An arbitration panel found that notwithstanding this misconduct the officer should be reinstated. After the reinstatement award, the Town discharged the officer again, based upon additional misuse of the online system discovered after the initial discharge. However, the arbitration panel was aware of and considered this additional evidence of misuse when it rendered its award. The Board rejected the Town's argument that the evidence of additional use was outside the arbitrators' scope of authority when it issued the award, noting that "arbitrators often consider after-acquired evidence of predisciplinary misconduct, particularly where the same type of misconduct is involved and potential remedial action is a concern."[292]

In *City of New Haven and Local 3144, Council 4, AFSCME, AFL-CIO*,[293] the Board found that the city had

[291] Case No. MPP-31,294; Decision No. 4907, July 14, 2016.
[292] *Id*. at 11. Judge Robaina denied the Town's motion to vacate.
[293] Case No. MPP-31,506, Decision No. 4894, May 18, 2016.

unlawfully harassed and retaliated against the union president for engaging in protected concerted activity in enforcing the collective bargaining agreement and pursuing grievances. While the city established that it would have engaged in much of the same activity under the contract in the absence of its anti-union animus and improper motive, the city sought to interfere with the union's presidential election, attempting to cause the union president not to be reelected. The Board issued a cease and desist order.[294]

In another case involving the City of New Haven and Local 3144,[295] the Board found that the city did not unlawfully refuse to bargain or transfer bargaining unit work when its controller, who was not a member of the bargaining unit, periodically posted updates to the city's website after the bargaining unit web designer retired.

In *Southington Board of Education and Locals 1303-72 & 1303-123 of Council 4, AFSCME, AFL-CIO*,[296] the Board concluded that the Board of Education did not unlawfully transfer bargaining unit work when it expanded community access to the renovated high school football field. The School Board permitted community organization members to lock and unlock vehicular gates, remove trash, and clean and restock bathrooms. The Board concluded that the work at issue is bargaining unit work. Bargaining unit members continue to perform the weekend work, but these functions were never performed exclusively by bargaining unit members. Others outside the unit have opened secured gates to the field in the past.[297]

V. The National Labor Relations Board

In 2016 the NLRB continued to address issues common to union and non-union employees alike, in areas involving social media, non-competition agreements, and arbitration agreements.

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294 *Id*. at 11-12.
295 Case No. MPP-31,241, Decision No. 4928, October 17, 2016, pp. 4-5.
296 Case No. MPP-30,583, Decision No. 4879, March 10, 2016.
297 *Id*. at 4-5.

In *Minteq International, Inc., and Specialty Minerals Inc., Wholly Owned Subsidiaries of Mineral Technologies, Inc. and International Union of Operating Engineers, Local 150, AFL-CIO*,[298] the Board found that the employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") "by requiring new employees to sign a Non-Compete and Confidentiality Agreement (NCCA) as a condition of employment without giving the Union notice and the opportunity to bargain about the NCCA." The Board also found that the "interference with relationships" and "At-Will Employee" provisions in the NCCA to be unlawful.

The Board found that the employer unilaterally implemented the NCCA without notice and an opportunity to bargain to the union, and the NCCA was a mandatory subject of bargaining, because (1) it includes work rules governing an employee's conduct during and after their employment; (2) the provisions of the NCCA "have a clear and direct economic impact on employees"; and (3) "employment is conditioned on acceptance of these provisions".[299]

The Board found the prohibition against the dissemination of "confidential information" to be unlawfully overbroad, because confidential information included "any other information which is identified as confidential by the Company." The Board found this provision to be overbroad "since it would allow the Respondent to designate any information – including information about employees' wages, benefits, and other terms and conditions of employment – as confidential and thus restrict employees' exercise of their Section 7 rights."[300]

The Board also found unlawful the NCCA's prohibition of solicitation of customers or suppliers. The Board held that "[t]he ability of employees to communicate with customers about terms and conditions of employment for mutual aid or protection is a right protected by Section 7 of the Act." This

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[298] 364 NLRB No. 63, 2016 WL 4087601 (July 29, 2016).
[299] *Id*. at *3.
[300] *Id*. at *7.

rule "clearly places restrictions on employees' ability to communicate with the Respondent's customers . . . includ[ing] asking customers to boycott the Respondent's products or services …."[301]

Finally, the Board found unlawful the at-will employee rule, since the rule indicating that all employees who signed the NCCA were at-will conflicted with the provisions of the parties' collective bargaining agreement, which required discharge to be for "just cause."[302]

In *Chipotle Services LLC d/b/a Chipotle Mexican Grill and Pennsylvania Workers Organizing Committee*,[303] the Board affirmed an administrative law judge's finding that Chipotle's "Social Media Code of Conduct" "that prohibits employees from posting incomplete, confidential, or inaccurate information and making disparaging, false, or misleading statements"[304] violated Section 8(a)(1) of the National Labor Relations Act ("Act"). The Board further ruled that the company unlawfully discharged an employee who circulated a petition concerning the company's failure to follow its own break policy and who refused his manager's directive to stop circulating the petition. The Board further struck down the company's rule prohibiting solicitation during nonwork time in work areas "within the visual or hearing range of customers" as being overbroad, since it was not limited to customer/selling areas, and therefore included areas where customers had no right to be but might be able to see or hear what was happening.[305] The Board further ordered Chipotle to post notices at all of its locations nationwide that it was rescinding its rules.

In *Jack in the Box, Inc. and Dana Ocampo*[306] the Board resolved rights of non-union employees, a divided three-member panel ruled that Jack in the Box's nationwide five page arbitration agreement, which employees were required

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301 *Id*. at *8.
302 *Id*. at *9.
303 364 NLRB No. 72, 2016 WL 4419756 (August 18, 2016).
304 *Id*. at n. 3.
305 *Id*.
306 364 NLRB No. 12, 2016 WL 3014419 (May 24, 2016).

to sign upon commencement of employment, violated Section 8(a)(1) of the National Labor Relations Act, because it (1) interferes with employees' Section 7 rights to engage in collective activity, including participation in class action litigation; (2) interferes with employees' access to the NLRB; and (3) interferes with employees' rights to engage in protected concerted activity regarding wages, hours and working conditions. The entire panel's majority found that the arbitration agreement was unduly restrictive in that it was the sole legal remedy for individual employees; the entire panel found that portion which prohibited an employee from disseminating the results of an arbitration award to be illegal. On appeal, the Board conceded it erred in finding that Jack in the Box's confidentiality provision was ever enforced, and the Fifth Circuit reversed.[307]

In *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*,[308] the NLRB no doubt sent shivers down the spines of many university presidents and deans. The Board ruled that student teaching assistants could qualify as employees under the Act, overruling its 2004 decision to the contrary in *Brown University*.[309] The Board summarized its reasoning:

> The *Brown University* Board held that graduate assistants cannot be statutory employees because they 'are primarily students and have a primarily educational, not economic, relationship with their university.' We disagree. The Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.[310]

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[307] Jack in the Box, Incorporated v. National Labor Relations Board, 671 Fed. App'x. 316 (5th Cir. December 13, 2016).

[308] 364 NLRB No. 90, 2016 WL 4437684 (August 23, 2016).

[309] Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Uaw Afl-Cio, 342 NLRB 483 (2004).

[310] *The Trustees of Columbia University*, 2016 WL 4437684. at *1.

What was important was that the student assistants were common-law employees; they were therefore statutory employees within the meaning of Section 2(3) of the Act. The Board made clear that the analysis of whether the student assistants had the right to form a union was whether there was an employment relationship between them and the university; that they were also students was irrelevant to the analysis.[311]

In *King Scoopers, Inc. and Wendy Geaslin*,[312] the Board changed its policy regarding interim expenses to be awarded to employees who were improperly discharged. The Board found that the employer violated Section 8(a)(1) of the Act when it suspended an employee who questioned whether the work she was assigned was within the work of her bargaining unit and then suspended her for her conduct during a grievance meeting.[313] The Board then took the opportunity to change its long-standing policy of what expenses were reimbursable when an employee is searching for work after discharge. The Board's previous policy was to treat "search-for-work and interim employment expenses as an offset to interim earnings". However, the Board concluded that such a policy discriminates against those "who are unable to find interim employment" and "do not receive any compensation for their search-for-work expenses." Moreover, "discriminatees who find jobs that pay wages lower than the amount of their expenses will not receive full compensation for the search-for-work and interim employment expenses."[314] The new policy is designed "to eliminate the offset" and to "bring these payments in line with the Board's treatment of similar expenses incurred by discriminatees."[315]

VI. Statutory and Regulatory Developments

A. *Defend Trade Secrets Act*

In May 2016, President Obama signed into law the

311 *Id*. at *11.
312 364 NLRB No. 93, 2016 WL 4474606 (August 24, 2016).
313 *Id*. at *4.
314 *Id*. at *7.
315 *Id*. at *8.

Defend Trade Secrets Act,[316] an amendment to the Economic Espionage Act, in order to provide civil remedies for trade secret misappropriation. The Act provides for a federal civil cause of action related to products in interstate or foreign commerce. The Act contains the following key provisions:

- "Trade secret" has the same definition as used in the Uniform Trade Secrets Act.
- "trade secret misappropriation" means acquisition by improper means, including "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy . . . ."
- A party seeking to take advantage of trade secret protection must demonstrate that it has taken "reasonable measures" to keep the information secret.
    - o Note, the Act does not define what is meant by "reasonable measures."
- A party seeking protection must also show the trade secret derives "independent economic value", also not defined in the Act.
    - o We can expect a body of federal common law to develop concerning how to define these terms.
- Under "extraordinary circumstances" a court may issue an order for an *ex parte* property seizure "necessary to prevent the propagation or dissemination of the trade secret." In order to obtain such an order a party must show (1) irreparable injury; (2) the information is a trade secret; (3), the misappropriation was done by "improper means."
- In addition to property seizure the Act provides for injunctive relief, actual damages, attorney's fees and punitive damages.
- There is a three-year statute of limitations.
- There is no preemption of state law.

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[316] Defend Trade Secrets Act of 2016, Pub. L. No. 114-529, 130 Stat. 376.

- The Act provides protections to employees who are subject to trade secret agreements with their employer. Thus, the employer must notify the employee that they have the right to disclose the trade secret in confidence to a federal, state, or local government official for the purpose of reporting or investigation a violation of law, or if made in a complaint or other document filed under seal.

B. *U.S. Department of Labor Overtime Rule*

The most anticipated, and debated, initiatives and regulations of the Obama Administrative was, without question, the Labor Department's rule doubling the minimum salary threshold required to qualify for the Fair Labor Standards Act's white-collar exemption to $47,476 per year, or $913.00 per week. Under the new rule overtime pay would be required for that group of employees, previously exempt, whose salaries fell between the old threshold of $23,660 and the new threshold.

As the rule was a long time in the making, many employers prepared for the change, reviewing their employment positions and reevaluating which positions were, or should be, exempt versus non-exempt, and taking steps to implement the new rule.

In November 2016, however, a District Court judge issued a preliminary injunction blocking the effect of the rule, just days before the rule was to take effect on December 1.[317] The Labor Department has appealed. In the meantime, however, many employers continue to follow the regulations in effect before the new rule was announced.

C. *New EEO-1 Reports*

A new order, issued by the Chair of the EEOC on September 29, 2016, requires employers with 100 or more employers to submit pay data by gender, race and ethnicity on the employer information report, known as the EEO-1. The new report will require information about the number

317 29 C.F.R. § 1904.35.

of workers within twelve specified pay bands. The deadline for the new EEO-1 report is March 2018.

D. *New OSHA Injury Reporting Rule*[318]

The Occupational Safety and Health Administration issued a new rule in 2016 requiring employers to submit injury and illness data electronically to the agency. Employers are already required to record this data in onsite OSHA Injury and Illness forms. Employers with 250 or more employees must electronically submit to OSHA injury and illness information on OSHA Forms 300, 300A, and 301. Employers with 20-249 employees must electronically submit information on Form 300A only. For 2016 the forms must be submitted by July 1, 2017.

The new rule also requires employers to advise employees of their right to report work-related injuries and illnesses without fear of retaliation. An employer may satisfy this obligation by posting the OSHA workplace poster, which is already required.

E. *EEOC Guidance on Leaves Under the Americans With Disabilities Act*

Observing that charges under the Americans with Disabilities Act (ADA) increased by 6% in fiscal year 2015 over the previous year, and noting a trend that employer policies often deny or restrict the use of leave as a reasonable accommodation, the EEOC issued a resource document discussing when permitting an employee to take leave is a reasonable accommodation under the ADA.[319] The resource document contains the following reminders or guidance:

- An employer may not require a doctor's note for employees with disabilities who wish to take paid sick leave while not requiring it for others. For example, an employee suffering from depression who wishes to take a few days off may not be obligated to provide a note from a psychiatrist. However, to the

[318] Nevada v. United States Department of Labor, 218 F. Supp. 325 (E.D. Texas November 22, 2016).

[319] www.eeoc.gov/eeoc/publications/ada-leave.cfm.

extent that the employer requires documentation from all employees in connection with sick leave the employer may require similar documentation from employees with disabilities.

- Because the reasonable accommodation under the ADA is designed to change the way things have been done to enable disabled employees to work, an employer may be obligated to provide unpaid leave to an employee with a disability, so long as doing so will not work an undue hardship on the employer. This obligation exists even in those situations where (1) an employer does not offer leave as an employee benefit; (2) the employee is not eligible for leave; or (3) the employee has exhausted leave.
- An employer does not have to provide paid leave in excess of its existing paid leave policy.
- An employer is entitled to obtain information from the employee's health care provider to assist in determining whether granting the leave will result in an undue hardship.
- An employer that has granted leave with a fixed return date may not require periodic updates, but may check on the employee's progress.
- Employers with maximum leave policies may be required to extend the leave in order to provide a reasonable accommodation.
- An employer may not require an employee to be 100% healed before returning to work if the employee is able to perform the job with or without an accommodation.
- Where a reasonable accommodation requires reassignment to another position, the employer must assign the employee to a vacant position without requiring the employee to compete with other applicants for the position.

In determining whether granting leave as an accommodation would result in an undue hardship the Guidelines provide the following factors should be considered:

- The amount or length of the leave required;
- The frequency of any intermittent leave;
- Whether there is flexibility as to the days when leave may be taken;
- The impact of the employee's absence on coworkers;
- The impact on the employer's ability to serve customers or clients appropriately and in a timely manner.

F. *EEOC Enforcement Guidance on National Origin Discrimination*

On November 21, 2016, the EEOC issued enforcement guidelines on national origin discrimination.[320] The guidance contained the following important information:

- National origin discrimination includes discrimination against an individual because that individual, or his or her ancestors, are from a certain place or have the physical, cultural, or linguistic characteristics of a particular national origin group;[321]
- An individual's place of origin may be a country, including the United States, or a former country, or a geographic region associated with a particular group of individuals;
- Discrimination is also prohibited against individuals because of their "national origin group", which includes those sharing a common language, culture, ancestry, race, or other social characteristics, such as Hispanics or Arabs;
- Discrimination based upon physical, linguistic, or cultural traits, such as an accent or traditional style of dress, is prohibited;
- Discrimination based upon perception is also prohibited. Thus, one discriminates against a person because they are thought to be from the Middle East,

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[320] U.S. Equal Employment Opportunity Commission, EEOC Enforcement Guidance on National Origin Discrimination, No.915.005, available at www.eeoc.gov/laws/guidance/national-origin-guidance.cfm.

[321] 29 C.F.R. § 1606.1.

even though that person does not identify himself or herself as Middle Eastern;

- Discrimination against one who associates with someone of a particular national origin is also prohibited;
- The guidance suggests that employers must not discriminate during the referral process, and can avoid unintentional discrimination by avoiding word-of-mouth recruiting, and using diverse recruiting sources;
- Employers may not discriminate to satisfy the preferences of clients, customers, or other employees;
- Title VII also protects against harassment on the basis of national origin;
- Note that a language fluency requirement is lawful only if fluency is required for the performance of one's job duties;
- Employers are not required to accommodate national origin traditions or practices at work. Note, however, that employers may need to grant requests for religious accommodation in the absence of undue hard ship;
- Immigration status does not affect whether an applicant or employee is protected by Title VII.

G. *EEOC Enforcement Guidance on Retaliation*

On August 25, 2016, the EEOC issued enforcement guidance on retaliation and related issues.[322] The guidance is significant in reminding people what constitutes retaliation:

- "Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces."
- The elements of a retaliation claim include partici-

[322] U.S. Equal Employment Opportunity Commission, *Compliance Manual Section 8: Retaliation*, No. 915.004 (2016), *available at* www.eeoc.gov/laws/guidance/retaliation-guidance.cfm.

pation in a protected activity, which includes and EEO process or opposition to discrimination; a materially adverse action taken by an employer; and a causal connection between the protected activity and the materially adverse action;

- Protected activity includes participation, such as "having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA."
- Protected activity also includes opposition to perceived employment discrimination. The "opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful."
- Opposition based upon a reasonable good faith belief is protected even if the conduct complained of is determined to be lawful;
- An employee may refuse to obey an order if the employee "reasonably believes that the order requires him or her to carry out unlawful employment discrimination." An employee may also refuse to implement a discriminatory policy;
- Resisting sexual advances or intervening on behalf of another employee is protected;
- Requesting a reasonable accommodation for a disability or religion is protected;
- Materially adverse actions include refusal to hire, denial of job benefits or promotion, suspension, and discharge, as well as reprimands, disparaging an employee to others or the media, scrutinizing work or attendance more closely than others, reassignment or threatening reassignment, threatening deportation, and any other conduct likely to deter protected activity;
- The causation standard requires "that 'but for' the retaliatory motive, the employer would not have taken the adverse action." The "but for" causation standard does not require that retaliation be the sole

cause of the adverse action;

- The employee has the burden of proving causation;
- Evidence of retaliation may include suspicious timing of the action; oral or written statements; comparative evidence of how others were treated; or inconsistent or shifting explanations;
- A claim of retaliation may be defeated by evidence that the employer was unaware of the protected activity; or there were legitimate non-retaliatory reasons for the action;
- The EEOC suggest that employers maintain a written anti-retaliation policy; provide training to managers, supervisors, and employees; and review employment actions before they are taken to ensure EEO compliance.

H. *OFCCP Updated Sex Discrimination Regulations for Federal Contractors*

The Office of Federal Contract Compliance Programs issued new regulations, aligning OFFCP's requirements for contractors with Title VII.[323] The new regulations are significant in that they:

- Prohibit the denial of accommodations for pregnancy, childbirth or related medical conditions;
- Prohibit facially neutral policies that have a disparate impact on the basis of sex;
- Do not preempt more stringent state and local prohibitions on the basis of sex. The regulations set a floor and not a ceiling against discrimination;
- The regulations do not address discrimination by educational institutions;
- Religious organizations that are not contractors, but recipients of grant funds, are not covered by the regulation.

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[323] 41 C.F.R. § 60-1 *et seq., available at* www.dol.gov/ofccp/regs/compliance/ca_11246.htm.

I. *EEOC Fact-Sheet on Bathroom Rights for Transgender Employees*[324]

In 2016 the EEOC issued a Fact Sheet indicating that transgender employees must be permitted to use a bathroom corresponding to the employee's gender identity, and not to an employee's sex at birth. "Transgender" is gender identity that is different from the sex assigned to an individual at birth. The EEOC made it clear that an individual need not undergo a medical procedure to be considered a transgender person.

J. *Connecticut Legislation*

1. Ban the Box

Pursuant to Public Act 16-83, effective January 1, 2017, Connecticut joined a growing number of states that have enacted "ban the box" legislation, designed to remove barriers to employment for those with a criminal history. The Act provides:

> No employer shall inquire about a prospective employee's prior arrests, criminal charges or convictions on an initial employment application, unless (1) the employer is required to do so by an applicable state or federal law, or (2) a security or fidelity bond or an equivalent bond is required for the position for which the prospective employee is seeking employment.

The Act further prohibits an employer from requiring an employee or prospective employee to disclose any arrest, criminal charge or conviction that has been erased.

2. Non-compete Covenants for Physicians

Effective July 1, 2016, Public Act 16-95 changed the parameters of restrictive covenants for Connecticut physicians. Any covenant not to compete entered on or after July 1, 2016, shall not restrict the physician's competitive activities for a period of more than one year, and in a geographic area of more than fifteen (15) miles from the "primary site"

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[324] *Available at* https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm.

where such physician practices. The "primary site" is defined to be only the office, facility, or location where a majority of the revenue derived from the physician's service is generated, or from any other location as may be agreed upon by the parties. In addition, a covenant not to compete will not be enforced if an employment contract expires and is not renewed, or if the employment relationship is terminated without cause.

3. Bi-weekly payment of wages

At long last, pursuant to Public Act 16-169, employers may now pay employees every two weeks without prior approval from the Connecticut Department of Labor, making lawful a practice that had been going on without approval by many employers.

4. Payroll Cards

Employers may now pursuant to Public Act 16-125, pay employees through "payroll cards," provided that employees are notified of the option of receiving compensation by direct deposit or by negotiable check. An employee must voluntarily and expressly authorize, in writing or electronically, the desire to be paid with a payroll card, and without fear of retaliation or discharge or other form of coercion. An employer cannot condition employment on the use of a payroll card as a method of payment. Furthermore, the payroll card must be associated with an ATM network, and employees must be able to make at least three free ATM withdrawals per pay period.

The Act also permits employers to provide employees with an electronic record of hours worked, gross earnings, deductions, and net earnings, so long as the employee consents, the employer provides a way for the employee to access the information, and reasonable safeguards exist to protect confidentiality of the employee's personal information.

Finally, employers may pay employees through direct deposit upon consent of the employee.

5. Expansion of the Connecticut Family and Medical Leave Act

The Connecticut FMLA now permits an eligible employee – i.e., an individual who has been employed for at least 12 months and has worked at least 1,000 hours – to

take up to 16 weeks of leave in a 24-month period because of an emergency arising out of an employee's spouse, son, daughter, or parent being on active duty or being notified of an impending call or order to activity duty in the armed forces. Public Act 16-195.

6. IRAs for Employees

Public Act 16-3, which will not be effective until January 1, 2018, creates the Connecticut Retirement Security Authority, which may establish a program requiring private sector employers to establish ROTH IRAs (after tax IRAs) for their employees. An employee who does not opt out from the program will be required to contribute 3% of wages to a Roth IRA, no later than 60 days after the employer provides the employee with information about the program. An employer covered by the Act is one that has at least five employees who were paid at least $5,000 in wages in the preceding calendar. An employee covered by the law includes those who have worked for a qualified employer for at least 120 days and are at least 19 years old. An employer is exempt if it maintains a retirement plan recognized under the Internal Revenue Code, such as 401(k), 403(b), or 401(a) pension plans.

7. Connecticut Minimum Wage

Effective January 1, 2017, the minimum wage in Connecticut was increased to $10.10 per hour.[325]

VII. Conclusion

2016 saw a significant increase in the number of cases filed at the CHRO, in the Superior Court, and in the District Court. The District Court judges issued more decisions in discrimination cases than in previous years. These facts and the increase in FLSA cases filed, we can expect an increase in rulings of interest in 2017 and beyond. With the change in the federal administration, we can also expect changes in NLRB rulings and in court rulings on appeals from NLRB decisions in 2017.

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[325] Conn. Gen. Stat. §31-58(i).

Benched: Abortion, Terrorists, Drones, Crooks, Supreme Court, Kennedy, Nixon, Demi Moore, and Other Tales from the Life of a Federal Judge
– Jon O. Newman, William S. Hein & Co., Inc., Getzville, N.Y, 2017. 302 pages.

On February 25, 1955, second-year Yale law student Jon O. Newman wrote the firm of Ritter and Satter about an opening for a summer job. He had obtained information about this opportunity from John Subak, who was a staff member of the Yale Law Journal and had the year before held summer employment with Ritter and Satter. Robert Satter wrote back to Newman on March 3, 1955, that "we. . .would be desireous [sic] of meeting you."[1] He continued: "[W]e have somebody from Harvard who also has approached us so I would suggest that you come up as soon as you can. The best time I'd say would be on a Saturday when both of us are here and the telephone is not jangling."[2] Satter later became a well-respected legislator and then a judge of the Connecticut Superior Court.

The Harvard applicant was not chosen, and Newman secured a summer job. After Yale graduation and federal clerkships, Newman returned as a partner, with the firm entitled "Ritter, Satter, and Newman." From this beginning, Jon O. Newman rose to become a stellar figure in Connecticut legal history, holding the positions of Connecticut U.S. Attorney, U.S. District Judge, and, for most of his career, a judge of the Second Circuit Court of Appeals. He was a finalist to become a U. S. Supreme Court Justice, but President Clinton selected Ruth Bader Ginsburg instead. One possible reason given by some knowledgeable figures for Judge Newman's failure to be selected was an Op-Ed that he wrote for the *New York Times* during the Clarence Thomas debate a few years before, urging Congress to reject Justice Thomas' nomination in favor of

[1] Letter from Jon O. Newman to Robert Satter (Feb. 25, 1955) and reply from Robert Satter to Jon O. Newman (Mar. 3, 1955)(on file with the State Library Record Group 069-160, Satter (Robert) Collection, 1926-1993, bulk 1952-1980).

[2] *Id.*

Newman's fellow judge on the Second Circuit, Amalya Kearse.[3] During President Clinton's selection process, the *Wall Street Journal* published an editorial critical of Judge Newman's *New York Times* Op-Ed.

Judge Newman has now written a thoughtful memoir of his life. Much of the book details his personal biography, including his lawyer-father's preparation of a genealogy of Greek mythological figures that the judge completed and published at the University of North Carolina Press. He describes his education at the Hotchkiss School in Lakeville, Connecticut, Princeton, and Yale Law School. One lesson he takes credit for learning, which also serves members of the legal profession well, was the ability to write not only accurately, but speedily.

He married Martha Silberman at age twenty-one, just as he entered Yale Law School. They were married for fifty-one years, and had three children and a number of grandchildren. I served on a board with Martha, who was one of the friendliest and most competent persons whom I have ever met. She died in 2005. In 2007, Judge Newman married Ann Leventhal, a writer, and the widow of a distinguished Connecticut attorney, David Leventhal.

The book's remaining chapters describe the Judge's District and Appellate court experiences. The judge's initial confirmation process in the District Court makes for fascinating reading. He ran into difficulties when the Nixon administration, after giving assurance that his name had been forwarded to the Senate Judiciary Committee, worked behind the scenes to defeat his nomination. He was helped throughout by Senator Abraham Ribicoff, whom Judge Newman served either as an informal aide or as a formal administrative assistant from the late 1950s to 1964, both in Connecticut and in Washington.

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[3] JON O. NEWMAN, BENCHED: ABORTION, TERRORISTS, DRONES, CROOKS, SUPREME COURT, KENNEDY, NIXON, DEMI MOORE, AND OTHER TALES FROM THE LIFE OF A FEDERAL JUDGE 181-82 (William S. Hein & Co., Inc. 2017). Judge Newman discusses the controversy over the Op-Ed in his book. He also states that he likely would have declined an appointment to the U.S. Supreme Court at that stage in his career.

Judge Newman names his most significant District Court decisions as two from 1972, finding first an 1860 anti-abortion statute unconstitutional, and then also finding unconstitutional a 1972 anti-abortion statute passed in response to his first ruling.[4] The Judge's rulings were based on the failure of the State to justify protecting the rights of the fetus over a woman's right to end her pregnancy, a rationale that was adopted later by the Supreme Court in *Roe v. Wade*.[5]

Judge Newman's Second Circuit decisions are numerous. He wrote several decisions on the First Amendment, including a concurring opinion in *Thomas v. Board of Education*,[6] which involved the right of high school students to distribute a publication that contained vulgar language. In his concurrence, he agreed to further hearings before the school board, stating cleverly that the students had the right to wear armbands at school in protest of the Vietnam War,[7] but not to wear Cohen's jacket.[8]

He has ruled multiple times on employment discrimination issues under Title VII of the Civil Rights Act of 1964. One such case was *Guardians Association v. Civil Service Commission*,[9] on the validity of a test and passing rates for those applying for employment as police officers. He concluded that the test had the illegal effect of excluding African-American applicants. He has also ruled in cases involving discrimination against women in employment. Two cases where he concluded that, in contrast to the majority opinions, the women had made out prima facie cases were *Fisher v. Vassar College*[10] and *Brown v. Coach Stores*.[11] In both cases Judge Newman issued dissenting

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4 Abele v. Markle I, 342 F. Supp. 800 (D. Conn. 1972) *vacated*, 410 U.S. 951 (1973); Abele v. Markle II, 351 F. Supp. 224 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973).

5 410 U.S. 113 (1973).

6 607 F.2d 1043, 1053-1058 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980).

7 *Id*. at 1054 (citing Tinker v. Des Moines Ind. School Board, 393 U.S. 503 (1969)).

8 *Id*. at 1055 (citing Cohen v. California, 403 U.S. 15 (1971), a case allowing adults to wear a jacket with a vulgar phrase on it into court).

9 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

10 114 F.3d 1332, 1361-86 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

11 163 F.3d 706, 713-17 (2d Cir. 1998).

opinions.

Another area of law that the Judge has ruled on is intellectual property. He has applied the "fair use" doctrine of copyright in allowing the performance of a song *I Love Sodom* as a parody of the New York City official ditty, *I Love New York*.[12] On the other hand, he disallowed an uncompensated use of an artist's "story quilt" by a television network.[13]

In the area of criminal law, one of his most significant cases affirmed the conviction on two counts of New York Congressman Mario Biaggi, whose operation of the Wedtech company the government alleged was a criminal enterprise.[14] He has also taken a leading role in the development of federal sentencing guidelines. After serving on a committee to develop the guidelines, he clashed with the federal sentencing commission, which opposed diversions from strict calculations so that a trial judge could apply equitable considerations. Judge Newman was somewhat vindicated by the Supreme Court decision in *United States v. Booker*,[15] giving more discretion to the district court judges in sentencing.

Judge Newman also discusses the traditions of the Second Circuit. This Court, unlike other federal Circuit Courts, permits oral argument in all cases. Although the rules of procedure allow a rehearing en banc, the Second Circuit, unlike others, hardly ever grants the request. The Judge also proposes changes to federal law, including lessening the immunity protections for law enforcement personnel, further limiting federal diversity jurisdiction, taking additional steps to end litigation abuse, and like his former partner, Judge Satter, in his own memoir,[16] recommending the capping of jury awards in civil cases.

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[12] Elsemere Music Inc. v. National Broadcasting Company, 623 F.2d 252 (2d Cir. 1980).

[13] Ringgold v. BETV, 126 F.3d 70 (2d Cir.1997).

[14] United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

[15] 543 U.S. 220 (2005).

[16] ROBERT SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK (Simon & Schuster 1990).

The Judge also discusses the outcome of the few of his decisions that were accepted by the Supreme Court for review. In *Roe v. Norton*,[17] he ruled that the Connecticut Department of Social Services was obliged to expend Medicaid funds for clients who were entitled to have an abortion. To Judge Newman, the right to an abortion was elusive if it was too costly for the woman. His decision was reversed in *Maher v. Roe*,[18] the U.S. Supreme Court stating that the right to an abortion did not mandate that the state must pay for it. Judge Newman continues to believe that the U.S. Supreme Court came to the wrong conclusion.

One of Judge Newman's decisions that he does not discuss in his book is *Pinsky v. Duncan*,[19] which had an effect on Connecticut civil practice. The majority in that case held that a prejudgment ex parte attachment of real estate was unconstitutional,[20] changing a Connecticut practice that had been in effect since the founding of the State. Judge Newman dissented, stating "[t]he Due Process Clause is not a code of civil procedure."[21] He also stated that the attachment of real estate "does not deprive the owner of any possessory rights in his property."[22] In his dissent, he noted that, although there are some consequences with any type of attachment, due process was met in this instance by an immediate, post-seizure hearing required by state law.[23] The Supreme Court, however, on granting of certiorari, agreed with the majority and struck down the ex parte practice.[24] Now pre-judgment remedy hearings for real estate take place before seizure under statutes passed subsequent to the U.S. Supreme Court's ruling.[25]

This book has a wealth of information for Connecticut amateur and professional historians. Judge Newman describes his interactions with politicians such as Abraham

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17 408 F. Supp. 660 (D. Conn. 1975), *reversed*, 432 U.S. 464 (1977).
18 432 U.S. 464 (1977).
19 898 F.2d 852 (2d Cir. 1990), *affirmed*, 501 U.S. 1 (1991).
20 *Id.*
21 *Id.* at 862.
22 *Id.*
23 *Id.*
24 Connecticut v. Doehr, 501 U.S. 1 (1991).
25 *See* CONN. GEN. STAT. § 52-278a et seq.

Ribicoff, John Bailey, and Ella Grasso. He was present on the Waterbury Green on Election Day 1960 at 3:00 a.m. in a rainstorm as John F. Kennedy spoke to a massive crowd; there was no denying that Kennedy would receive Connecticut's electoral vote.[26]

Judge Newman reports on his law firms from his days of private practice, including Ritter and Satter and then Satter and Fleischmann, with whom he shared space. During his 1978 Second Circuit confirmation process, he mentions the pioneering woman attorney, Barbara Sacks, who served on the President's panel to recommend Circuit Court nominees. He also relates a run-in he had during his 1972 confirmation to the District Court with Stewart H. Jones, who had succeeded Judge Newman as U.S. Attorney in 1969.

Of course, there are the judges whom he has encountered. These include Chief Justice Earl Warren, for whom he served as a law clerk, and Second Circuit Judges Learned Hand, J. Edward Lumbard, James Oakes, Irving Kaufman, Henry J. Friendly, and J. Joseph Smith. Thurgood Marshall began his judicial career in the Second Circuit and the courthouse bears his name. Judge Newman has remembrances of Justice Marshall.

In the District Court, he portrays Judges M. Joseph Blumenfeld, and Judge T. Emmet Clarie. Judge Clarie made a telling point in reacting to Judge Newman's efforts at appointment to the Second Circuit. Judge Clarie said to Judge Newman: "I hope you enjoy that [contemplative] library court."[27] Judge Newman shows in this autobiography how much he has enjoyed, and, how much he has benefited the people of this country, in serving as a Circuit Court Judge.

–JUDGE HENRY S. COHN*

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* Judge Trial Referee, New Britain.

[26] THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1960 (Atheneum Publishers 1961).

[27] NEWMAN, *supra* note 3, at 129.

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