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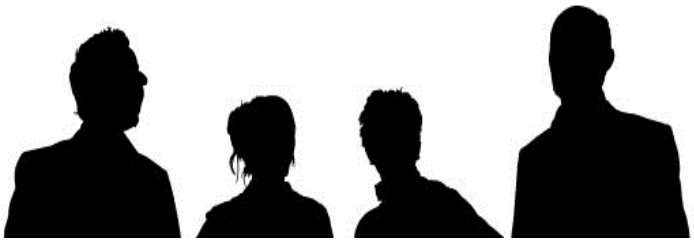
Employment Law Update



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LOCATIONS

2015 DEPARTMENT OF LABOR AND VERMONT SUPREME COURT DECISIONS ON UNEMPLOYMENT COMPENSATION CONTRIBUTIONS – A MIXED BAG FOR EMPLOYERS

By: Gary Karnedy

The Vermont Department of Labor continued to be an uncertain venue for employers in 2015. With some exceptions, the Vermont Supreme Court tended to take a pro-employee approach in 2015.

Bradford Trucking, Inc. v. Department of Labor

In June of 2015, the Vermont Supreme Court upheld a finding that various bookkeepers working for a small bookkeeping company were in fact employees of a trucking company. The bookkeeping company was run by the mother of the principal of Bradford Trucking. Because the mother had such a close relationship to the company, *Bradford's Trucking, Inc. v. Department of Labor* is a classic example of bad facts making bad law.

Mother Bradford had set up her own business to provide bookkeeping services for the trucking company and two other customers for several years. Nonetheless, the Supreme Court found that since she was an officer of the trucking company, she was actively participating in directing herself and others to perform bookkeeping services. Consequently, that work was done at Bradford Trucking's "control and direction". Part of the Court's reasoning was rather strained, finding that bookkeeping was somehow integral to the trucking business. However, it was also fairly swayed by the persuasive fact that the two bookkeepers Mother Bradford retained to do the Trucking Company's bookkeeping work were not regularly serving as bookkeepers for hire, and one was the principal's fiancée whose primary vocation was a daycare provider.

Several other cases decided by three member panels of the Vermont Supreme Court are reviewed below. Although not binding legal precedent, they further evidence the Court's inclination in 2015 to find an employment relationship in unemployment cases.

Zarcadoolas v. Department of Labor

In October, the Court upheld a DOL finding that an employee was entitled to receive unemployment because his poor performance did not rise to the level of "misconduct". The employee was a fine dining manager, who was warned on several occasions from June –October that he had failed to have new employees complete necessary paperwork and take a state

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required liquor seminar. He had various other employment deficiencies as well, but none of those were raised with him at the time of his dismissal. The employer also waited until business slowed down in December to terminate him. The Board found that the delayed termination made the employee's shortcomings appear more careless or negligent, rather than amounting to a "substantial disregard of the employer's interest" severe enough to trigger an immediate dismissal.

Willette v. Department of Labor

In August, the Supreme Court found that an employee was entitled to unemployment compensation, overruling a DOL denial of his application. Willette worked as an overnight staff member at a group home for Washington County Youth services. Smoking was allowed on the deck of the home, but the employer had a strict policy that only one resident was allowed on the deck at a time unless a staff member was present, allowing for two residents to be on the smoking deck at once. The employee had allowed four residents to go out on the deck at 2:30 am without supervision, and one resident intentionally burned two others with his cigarette. The Board found that the employee's blatant disregard of the policy met the standard of "gross misconduct" necessary to deny unemployment compensation. The Supreme Court disagreed. It ruled that gross misconduct is defined by statute to amount to such things as theft, fraud, or intoxication, and the smoking deck error did not rise to a similar level. The case was remanded for a determination of whether the claimant was terminated for simple misconduct.

Shaw v. Department of Labor

Shaw was a case where both the DOL and the Vermont Supreme Court found in favor of the employer. In August, the Court affirmed the Department of Labor's decision denying an employee's request for unemployment compensation benefits on the ground that the claimant left her previous employment voluntarily. Shaw worked the night shift as a nursing assistant, and applied for a day shift. After her application was denied, she was upset and submitted a two week notice letter. She subsequently asked to be considered for per diem work. The employer considered her request, but decided against offering her per diem work. The DOL found that Shaw's claim that her supervisor had promised her per diem work was not credible. The DOL and Supreme Court concluded that the claimant was not entitled to unemployment compensation because she had initiated the separation without good cause attributable to the employer.

If you have questions on these or other employment law issues, please contact the Primmer Employment Law Team.

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