NEWS

State High Court Provides Guidance on Use of Settlement Communications as Evidence

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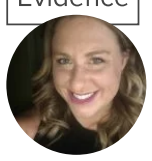
Evidence



Allison Dunn

What You Need to Know

- A nurse who was employed by the Connecticut Department of Mental Health and Addiction Services, sought damages for employment discrimination and retaliation and introduced three pieces of evidence that addressed policies and sought meetings to discuss accommodations.
- The defendants claimed that the communications were improperly admitted because they included settlement communications. The Connecticut Appellate Court agreed.
- In a 5-1 ruling, the state high court majority sided with the plaintiff and held the trial court had not erred, finding there was nothing in the record to show that the communications occurred within the context of the commission's mandatory mediation program.

Relying on federal case law, the Connecticut Supreme Court reasoned that a party's offer to settle a claim may be admissible for showing participation, or lack thereof, in the good faith interactive process.

Regardless of whether the exhibits at issue constituted settlement talks in *Kovachich v. Department of Mental Health and Addiction Services*, in a 5-1 majority, the Connecticut Supreme Court said the evidence was admissible to show the defendant failed to engage in the good faith interactive process as required by Connecticut Fair Employment Practices Act (CFEPA), according to the majority opinion released Tuesday.

The plaintiff, Virlee Kovachich, a nurse at the Department of Mental Health and Addiction Services, suffers from allergic and nonallergic rhinitis and asthma, experiencing debilitating reactions when exposed to certain scents. She had requested reasonable accommodations such as being allowed to use a fan if there was a scent that affected her, enforcing a scent-free zone on her unit, and educating others about the need for a scent-free environment.

However, Kovachich claims DMHAS refused to provide reasonable accommodations and failed to engage in the good faith interactive process. The defendant challenged the reasonableness and effectiveness of the department's accommodations.

Following a bench trial in New London Superior Court in 2018, Judge Joseph Q. Koletsky entered judgment in favor of Kovachich, finding the employer failed to provide reasonable accommodations and that the defendant had retaliated against Kovachich by constructively discharging her for filing a complaint with the Commission on Human Rights and Opportunities, in further violation of CFEPA, the majority opinion said.

On appeal, the defendant argued that three pieces of evidence had been improperly admitted under Connecticut Code of Evidence 4-8 because they included settlement communications between the plaintiff and defendant's attorneys and a CHRO investigator.

The evidence in dispute included an email with the subject "RE: Kovachich—request for demand" from Kovachich's counsel to Assistant Attorney General Jill Lacedonia. The message asked for a time to talk, mentioned issues upon which the parties purportedly reached agreement "at the last mediation session," and included information about DMHAS policies. The email ended with: "'In any event if you are willing to work with me to find a solution then we can see if litigation can be avoided. I am available on Friday,'" the majority opinion said.

In another email to Lacedonia, the plaintiff's attorney said the plaintiff "'is not going to accept a solution that has her apply for disability retirement as you suggested. We thin[k] that is the wrong approach to [a] disability that can be accommodated. We are going to move forward with this case. We would like that to be in context of the [defendant] changing its approach—to formally adopt a policy that is endorsed by the highest levels of management, to educate, and to empower supervisors to take action when employees intentionally disrespect the right to breathe despite emails asking for awareness. Let me know what solutions your side proposes.'"

In the third piece of disputed evidence, the plaintiff's attorney also sent a letter clarifying the client's demands relating to her disability, stating "'We would be happy to meet with representatives of the [defendant] who have authority to discuss and recommend these requests,'" the opinion said.

The trial court had overruled the defendant's objection to the evidence, but a three-judge panel of the Connecticut Appellate Court held that this was an evidentiary error that caused "substantial prejudice to the defendant because 'the [trial] court impermissibly considered the plaintiff's settlement communications on the issue of liability' by 'grounding its findings that the defendant had failed to engage in the interactive process on the inadmissible settlement communications."

On appeal, the Connecticut Supreme Court was asked to consider if reasonable accommodations proffered during the course of settlement communications are admissible under §4-8 (b) (1) of the Conn. Code of Evid. for the purpose of demonstrating a party's compliance or noncompliance in the good faith interactive process.

Limited by state caselaw, the majority looked to federal cases, including *Griesinger v. University of Cincinnati* in which the Southern District of Ohio concluded in 2016 that offers of accommodations made by counsel for the defendant to the plaintiff's counsel could be admissible for the purpose of showing that the university engaged in the interactive process to reach a reasonable accommodation. In 2007, the Eastern District of New York stated in *Williams v. British Airways* that "'settlement discussions may be considered in the ADA context for the purpose of assessing a party's participation in the interactive process.'"

In a 5-1 ruling, the state high court majority held that these, and other federal opinions in similar cases, were persuasive. The majority held that "a party's offer to settle or compromise a claim may, under the appropriate circumstances, be admissible under subdivision (1) of §4-8 (b) of the Connecticut Code of Evidence for the purpose of establishing a party's initiation or of participation in the good faith interactive process required by CFEPA, or the failure to communicate with the opposing party by way of initiation or response," the opinion said.

"The defendant and the dissenting opinion contend that exhibits 12, 13, and 14 improperly were admitted for the purpose of demonstrating the defendant's liability, rather than 'for another purpose' under §4-8 (b) (1). Not so … [T]he purpose of the evidentiary admission was 'not to show liability but to show that [a party] was engaging in the interactive process.' *Cook v. Morgan Stanley Smith Barney*, supra, United States District Court …" Justice Steven D. Ecker wrote on behalf of the majority. "Notably, the trial court did not rely on these exhibits to find that the defendant engaged in discrimination; that finding was predicated on the trial court's determination that the defendant had 'failed to effectuate [the plaintiff's] accommodations …'

"Although the trial court relied on the defendant's failure to respond to exhibit 14 to find that 'the good faith interactive process' required by CFEPA had broken down … that finding was based on the defendant's failure to present any evidence that it responded to the plaintiff's communication, rather than the content of the communication itself," Ecker continued. "We therefore reject the contention that the purpose for which the challenged communications were proffered, admitted, and relied on was improper."

Justices Andrew J. McDonald, Raheem L. Mullins, Maria Araujo Kahn, and Christine E. Keller concurred. The case was remanded to the appellate court with the direction to consider other claims.

Chief Justice Richard A. Robinson disagreed with the majority, concluding that the appellate court was correct in reasoning that the letter and emails contained settlement communications that were inadmissible.

“The plaintiff argues that, because a failure to engage in the interactive process does not, standing alone, prove a violation of the act, the trial court properly admitted the exhibits for a purpose other than liability. I disagree with this argument,” Robinson wrote. “Although the plaintiff correctly observes that a failure to engage in the interactive process, *alone*, does not constitute independent grounds for liability; see *Sheng v. M&TBank Corp.*, 848 F.3d 78, 86–87 (2d Cir. 2017); it does not follow that the failure to engage in the interactive process is a matter entirely distinct from the liability inquiry as a matter of law. See *Snapp v. United Transportation Union*, 889 F.3d 1088, 1097 (9th Cir. 2018) (”[m]ost circuits have held that liability ensues for failure to engage in the interactive process when a reasonable accommodation would otherwise have been possible” (internal quotation marks omitted)), cert. denied sub nom. *Snapp v. Burlington Northern Santa Fe Railway Co.*, U.S., 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019).”

The plaintiff’s attorney, Jacques J. Parenteau, partner at Madsen, Prestley & Parenteau, said he’s happy with the majority’s opinion and optimistic that the decades-long litigation will soon come to a close in his client’s favor. The case also provides more clarity for attorneys who focus on employment discrimination, he said.

“It was a real minefield to be in a position where you’re supposed to have an obligation to communicate your request for accommodation and that’s not a static thing. This case very well demonstrates and the court emphasizes, it’s a continuing obligation. Now we have clarity. The court acknowledged that it may be very difficult, in some circumstances, to distinguish between settlement negotiations and interactive process when the good faith interactive process bleeds into the settlement process,” Parenteau said. “Of course, that happens all the time in disability discrimination cases if you’re moving forward with something at the CHRO and now we have a clear cut rule that firmly establishes that if you’re offering the evidence for purpose other than to establish liability, it can be admitted and so you’re not at risk of failing to establish the elements of your claim and you’re able to forcefully present that claim without that fear that someone’s going to claim down the road that this is inadmissible settlement negotiation.”

On Friday, Art Mongillo, a spokesman for DMHAS, declined to comment.

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