

Punitive Damages At Issue In UPS Worker's Case

Initial \$1 million verdict against courier service sliced in half

By **CHRISTIAN NOLAN**

M*ichael Tomick v. United Parcel Service, et al:* A Superior Court judge has eliminated \$500,000 in punitive damages from a verdict awarded to a United Parcel Service worker who claimed that the courier company had wrongly fired him.

Michael Tomick, 45, of the town of Lebanon, has been battling with his employer ever since he was fired in early December 2004. Since then, there have been numerous pre- and post-trial motions - with more apparently to come. The state Appellate Court will take a look at the trial

court's decision to cut the initial \$1 million verdict in half.

According to Tomick's lawyer, **Michael Colonese**, of **Brown Jacobson P.C.** in Norwich, Tomick had been working at UPS for about 18 years and devel-

oped a lower back injury in 2003 that kept him out of work for a number of months.

After being out on workers' compensation for those months, Tomick returned to work in 2004, despite 15 percent permanent partial disability to his back. In the week following Thanksgiving in 2004, at the start of the courier's peak season, Tomick aggravated his back while lugging a package up some steps to a home.

Tomick was unable to work the following day and went to see the doctor. The doctor did not place restrictions on his work, but Tomick asked his supervisor if he could have a helper.

During the holiday season, UPS tends to add helpers to assist drivers with all the extra packages and deliveries.

However, on the day he returned to work, Tomick had no helper. There's conflicting accounts of whether UPS assigned a helper who was a no-show,

or if no effort was made to get one. Either way, Tomick did the work himself, increasing his pain to the point that he could not get through the whole work day.

Angered, Tomick's wife called his supervisor, Kevin Trudelle, a named defendant in the lawsuit, and complained. Exactly what Trudelle said is unclear. But court documents indicate he responded to the woman "in a harsh and abusive tone."

After Tomick returned his truck, he was ordered by his boss to take a drug test for what the boss characterized as irrational behavior. Tomick did not want to take a drug test but was threatened with termination if he refused.

Tomick also told the boss: "I should have kicked your ass for what you said to my wife earlier," referring to the phone spat. Even the lawyer representing UPS, **Michael C. Harrington** of **Murtha Cullina** in New Haven, acknowledges that Tomick's wife was brought to tears by the argument.

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settlements

Tomick went to his doctor, who did a quick visual sobriety test, but apparently saw no reason to take a urine sample for use in a drug test. Tomick was placed on "light duty" and restricted from lifting no more than 10 pounds, said his lawyer.

Colonese said that when Tomick arrived to work the next day, he expected to be given light duty work, but was again asked to take a drug test. Tomick reluctantly agreed, to avoid being fired. But plaintiff's attorney Colonese said UPS broke the law by ordering the test.

"The only time an employer can single out an employee and order them to take a drug test is if the employer has a reasonable suspicion that the employee is under the influence at the time," said Colonese. "They didn't have a reasonable suspicion. They were just looking to bully him or give him a hard time."

Before Tomick could actually take the drug test, his lawyer says that two supervisors came in and fired him, saying that his "should have kicked your ass comment" to his supervisor constituted workplace violence.

The union representing UPS drivers filed a grievance on Tomick's behalf. On the eve of a May 2006 hearing, Tomick was offered his old job back if he could physically perform

the work. However, doctors had still not cleared Tomick to lift the amount of weight, as much as 70 pounds, required of a UPS delivery person.

A neurologist finally cleared Tomick to return to work in August 2009 but UPS would not take him back. For his time out of work, Tomick received \$90,000 in workers' compensation payments, according to defense attorney Harrington.

In addition to the union grievance, Tomick filed a lawsuit in state court that was initially transferred to federal court. Federal discrimination claims were dismissed during summary judgment, explained Harrington, and the case was re-filed in state court in New London.

The case eventually went to trial this past summer on three counts - disability discrimination, violation of the state's drug testing statute and negligent infliction of emotional distress. After six days of trial before Superior Court Judge **Emmet L. Cosgrove**, the jury found for Tomick. "It was certainly gratifying at the end to see that the jury found for Mr. Tomick on all counts and that his rights had been violated by UPS," said Colonese.

Also as part of the verdict, UPS must allow Tomick to return to work, a move that UPS is still appealing.

The jury awarded damages totaling \$500,000 for the three counts and

an additional \$500,000 in punitive damages. However, a post-verdict motion by Harrington arguing that punitive damages are not available under the Connecticut Fair Employment Practices Act was granted by Judge Cosgrove.

That halved the total award to \$500,000. Later hearings added \$167,000 in attorney fees, another ruling that Harrington is appealing, and \$47,000 in back pay. Colonese said the total potential payout is currently around \$715,000.

Colonese is appealing the judge's decision to eliminate punitive damages. Harrington acknowledged that the question of whether punitive damages apply to the Connecticut Fair Employment Practices Act has never been decided at the appellate level in the state.

Harrington is also appealing the overall verdict. For one thing, the defense attorney questions how UPS could violate the drug testing statute when Tomick never actually took the test.

The two lawyers agree on one thing. They have spent a lot of time debating events that happened in a very short period of time. "Unlike a lot of [employment] cases, there's no prolonged history. It really all happened over a day and a half," said Harrington.