

# Massachusetts Employment & Labor Law Report

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## New Law Mandates Treble Damages for Wage Violations

Senate Bill No. 1059 passed into law without the endorsement of Governor Deval Patrick on Monday, April 14, 2008. The new law, Chapter 80 of the Acts of 2008, makes violations of Massachusetts wage and hour laws, including inadvertent violations, subject to mandatory treble damages awards with no available defense. Thus, under the new law, employers who act in "good faith," and who take reasonable steps to comply with Massachusetts wage and hour laws, will be subject to the same mandatory treble damages as those employers who willfully violate them. Chapter 80 is the first law of its kind in the nation, setting Massachusetts apart from all other states and the federal law, which provides a good faith defense under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 260.

In mid-February, the Legislature passed the original S. 1059 bill and presented it to the Governor. Governor Patrick returned the bill to the Legislature on February 21 with a proposed amendment that would have allowed employers to avoid treble damages so long as they could show by clear and convincing evidence that they acted in good faith. The Legislature rejected the proposed amendment by considerable margins in both the House and the Senate, and on April 3 the bill was again presented to the Governor for his signature or veto. By taking no action on the bill within ten days after its second presentation to him, Governor Patrick allowed S. 1059 to become law.

See "Wage Violations," page 2

## Prompt Sexual Harassment Investigation Defeats \$1M Punitive Damages Award

In *Trinh v. Gentle Communications, LLC*, the Massachusetts Appeals Court affirmed a trial judge's ruling that Gentle was not directly liable for the sexually harassing conduct of one of its chief dentists. This decision is good news for employers who promptly and thoroughly investigate sexual harassment complaints.

Gentle hired Lisa Trinh to work in one of its dental offices as a care coordinator. Gentle gave Trinh a copy of its sexual harassment policy, which Trinh signed. The managing dentist at the Brookline office where Trinh worked began making inappropriate sexual remarks and brushing up against Trinh. Just days before Trinh was to be transferred to a different dental office, she notified the Brookline office administrator of her complaints about the managing dentist. Human Resources Director Donna Simonds and Gentle's Chief Operating Officer immediately investigated Trinh's complaints. Simonds made an appointment with Trinh to speak with her, and she also interviewed multiple employees at the Brookline office, including the managing dentist, as well as employees in other offices. On the day of Trinh's scheduled interview, she cancelled because of stress. They rescheduled the meeting and Simonds continued her investigation. Simonds attempted to meet with Trinh the following week, but Trinh prematurely ended the brief interview to deal with a patient. Trinh resigned several days later.

See "Harassment Investigation," page 2

## MCAD Clarifies Its Position on Maternity Leave Law and Its Application to Male Employees

In response to reports that it intended to apply the Massachusetts Maternity Leave Act to male employees, the Massachusetts Commission Against Discrimination has clarified its enforcement position. Consistent with its current guidelines and the plain language of the statute, male employees who become parents (whether through birth or adoption) remain ineligible for the eight weeks of maternity leave provided by the MMLA to women who give birth or adopt a child. In some circumstances, however, the MCAD may investigate gender discrimination claims by male complainants who allege that women received superior leave benefits than men pursuant to their employer's policies. The MCAD, which views the MMLA as facially discriminatory against men who become parents, also plans to pursue legislation that would make the MMLA gender-neutral. Employers should consider revising their own leave policies to address any potential gender discrimination issues.

*“Wage Violations,” continued from page 1*

Whether this new law applies only prospectively, or retroactively as well, is likely to be the subject of debate. An earlier version of S. 1059 was titled “An Act to Clarify the Law Protecting Employee Compensation,” with a provision that stated: “This act is intended to clarify the existing law and to reiterate the original intention of the [Legislature] that triple damages are mandatory.” However, in passing the final version of Chapter 80, the Legislature removed all language suggesting that the act was “clarifying” prior law.

Chapter 80 encompasses a wide variety of wage payment practices, including overtime pay, minimum wage, pooling and distribution of gratuities and service charges, vacation pay, prompt payment of wages due to active and terminated employees, Sunday and holiday premium pay under the Massachusetts Blue Laws, and restrictions on the use of independent contractors. The scope of Chapter 80 poses a significant risk to employers, who now face the prospect of mandatory treble damages for each violation. This risk is compounded by the fact that Massachusetts wage and hour laws are highly technical and often very complex.

Seyfarth Shaw has assembled a Response Team of experienced wage and hour attorneys to assist employers in assessing and addressing potential exposure posed by the new law. Please contact any member of our Wage & Hour Practice Group to address your concerns about the impact that the passage of this bill will have on your business. You may also visit [www.seyfarth.com/s1059](http://www.seyfarth.com/s1059) for more information.

*“Harassment Investigation,” continued from page 1*

Trinh filed suit against Gentle and the managing dentist for sexual harassment. The jury found the managing dentist individually liable for sexually harassing Trinh and awarded her compensatory damages as well as a \$65,000 punitive damages award. The jury found Gentle separately liable for the managing dentist’s sexual harassment and awarded \$1 million in punitive damages. The managing dentist and Gentle both filed motions challenging the jury’s verdict. After review, the trial judge upheld the punitive damages award against the managing dentist and limited the compensatory damages to \$20,000 against Gentle and the managing dentist (jointly and severally). Further, the trial judge concluded that there was no evidence to support a finding of separate liability against Gentle or the award of \$1 million in punitive damages. On appeal, the Court upheld the trial judge’s decision, determining that although Gentle could be vicariously liable for the managing dentist’s harassment, Gentle was not directly liable because it took adequate remedial action once it was on notice of the

harassment. The Court’s analysis focused on several factors, including the promptness of Gentle’s response upon learning of the harassment, the thoroughness of Simonds’s investigation, and the fact that Trinh did not participate fully in the investigative process. Thus, the damages against Gentle were limited to \$20,000 in compensatory damages and attorneys’ fees.

The Court’s ruling confirms that an employer can avoid direct liability and perhaps punitive damages, even when the sexual harassment involves a supervisor or manager, by implementing an appropriate harassment policy and conducting prompt investigations following any complaints.

### First Circuit Rejects “Disloyalty” Defense to Retaliation Claim

In *DeCaire v. Mukasey*, the U.S. Court of Appeals for the First Circuit rejected a verdict by a U.S. District Court judge for the District of Massachusetts in favor of the employer on the plaintiff’s gender discrimination and retaliation claims. The District Court had made the unusual finding that although the plaintiff’s supervisor had taken several adverse actions against her after she lodged complaints of gender discrimination, the supervisor was motivated by personal dislike of the plaintiff, not unlawful gender animus or retaliatory intent. In overturning the District Court’s decision, the First Circuit clarified the retaliation standard and criticized the District Court’s ruling on several grounds.

Cynthia DeCaire, a Deputy U.S. Marshal, filed suit against her employer, alleging that she experienced gender discrimination and then retaliation after she complained about the discrimination to the Equal Employment Opportunity (EEO) office. DeCaire alleged that her supervisor, during a one-year period, transferred her to an office location she did not want; effectively demoted and transferred her to a less favorable position; denied her assignments that she sought; and gave her several additional assignments and transfers that were unfavorable. Much of this conduct occurred after her first EEO complaint. After a bench trial, the District Court ruled against the plaintiff on both the gender discrimination and retaliation claims.

In analyzing DeCaire’s retaliation claim, the District Court found that she had met the necessary elements to establish a *prima facie* claim for retaliation. It nevertheless concluded that DeCaire’s retaliation claim failed because the treatment she experienced was based on the supervisor’s personal hostility toward her and her perceived disloyalty, not gender bias or an intent to retaliate. The District Court also found that the alleged adverse actions would have occurred even if the plaintiff had been male.

The First Circuit ruled that the District Court made several errors of law. The Court rejected the District Court's finding that the defendant was motivated by disloyalty and not retaliation. The Court stated that "as a matter of law, the filing of an EEO complaint cannot be an act of disloyalty . . . which would justify taking adverse actions." Further, while Title VII's discrimination provision prevents discrimination based on protected status, the anti-retaliation provision shields protected conduct. The District Court's analysis of the retaliation claim improperly focused on whether the employer would have taken the same action against a male employee. Instead, the relevant inquiry is whether the supervisor took adverse action against the plaintiff for filing a complaint, not whether he was motivated by a protected classification (*i.e.*, gender).

This decision sends a clear and important message to employers: perceived "disloyalty" should not serve as the basis for taking adverse action against an employee who complains about discrimination. The decision also clarifies that an employee's gender (or other protected status) is irrelevant to the retaliation analysis. Rather, the temporal proximity between the employee's complaint and the adverse action, as the First Circuit discussed in *DeCaire*, is a key factor in retaliation cases.

### "Staring" May Constitute Sexual Harassment

In *Billings v. Town of Grafton*, the First Circuit confirmed that a sexually hostile work environment can exist even if the harasser lacks sexual intent. The Court ruled that a supervisor who repeatedly stared at a subordinate's breasts may create a hostile work environment, even without sexual comment or proposition.

A few months after starting her position as secretary to Grafton Town Administrator Russell Connor, Jr., Nancy Billings began to notice that Connor often looked at her chest during their conversations. After making eye contact with her, his eyes would shift down to her chest for a few seconds. Connor's behavior made Billings so uncomfortable that she avoided being alone with him and held paper in front of her chest while walking through the office.

One morning, Connor stared at Billings so frequently during the first half-hour of her workday that she went home to change her clothes. When Billings returned, she formally complained to the Town's sexual harassment officer, Nancy Hazen. Billings's "formal" complaint was not the first time Hazen had heard similar accounts of Connor's behavior: Billings and other female employees had mentioned Connor's behavior previously.

The Town's Board of Selectmen retained an attorney to interview Billings and two of the three employees who mentioned Connor's staring. Though Connor's staring initially decreased, it later returned to its prior frequency. Billings continued to report the staring and a second attorney for the Town conducted an investigation, but determined that Billings's allegations could not be sustained.

Billings filed a complaint with the state and federal anti-discrimination agencies, alleging sexual harassment and retaliation. The Town initiated a third investigation by an outside attorney who found for a third time that Billings's allegations could not be supported, despite confirming that Connor did look at Billings's chest. When Connor learned of the attorney's findings, he visited an ophthalmologist who diagnosed him with an eye condition characterized by the loss of fixation and outward drifting of one eye.

After Billings removed her case to federal court, the District Court awarded summary judgment to the Town, ruling that though Billings subjectively found Connor's staring abusive, the staring did not create an objectively hostile environment because it "did not include touching, sexual advances, or 'overtly sexual comments to or about her.'" In overturning the District Court's ruling, the First Circuit noted that a sexually hostile work environment did not require a "particular kind of conduct." Although Connor's behavior did not impede the plaintiff's work, and notwithstanding Connor's eye condition, a reasonable jury could find that a sexually hostile work environment existed. More than two years of regular staring at Billings's chest could not be dismissed as "isolated" conduct.

This case underscores the risk in failing to address conduct that an employee subjectively perceives as harassment, even if an employer's investigation concludes that harassment did not occur and notwithstanding the alleged harasser's lack of intent.

### Commission Plan Upheld on Appeal

In *Bohne v. Computer Associates International, Inc.*, the First Circuit overturned a jury verdict in favor of a former employee who sued to receive an unpaid commission. The defendant employer had argued that the employee was not entitled to the commission under the terms of the commission plan. The plaintiff argued that the employer's refusal to pay him the commission violated the covenant of good faith and fair dealing implied in all contracts, even though no commission was due to him under the commission plan.

John Bohne worked as a sales executive for Computer Associates (CA). Bohne's compensation included commissions paid pursuant to a sales compensation plan. The plan provided that Bohne was entitled

to a sales commission if CA received payment from the sale within 90 days of coming due, but if Bohne was terminated, he would not be owed any commissions for which payment was not received within 30 days of the termination date. In August 2002, CA terminated Bohne for violating company rules. Bohne sued, claiming that he was entitled to a commission on a sale he had arranged prior to his termination, but for which CA did not receive payment within 30 days of his termination. Bohne argued that despite the written plan, an implied covenant of good faith and fair dealing entitled him to the commission.

The trial judge instructed the jury on two alternate theories of liability against CA. The first theory – rejected by the jury – was that CA terminated Bohne in bad faith to deprive him of this sales commission. Over CA's objection, the trial judge further directed the jury to determine whether the commission plan itself was so fundamentally unfair as to violate the covenant of good faith and fair dealing. The jury returned a verdict for Bohne on this second theory, determining that the plan's forfeiture provision was so unfair that it violated the implied covenant.

On appeal, the First Circuit reversed the jury verdict and entered judgment in favor of CA. The Court found no basis in Massachusetts law for the trial judge's second jury instruction, noting that the doctrine of good faith and fair dealing addresses the manner in which contractual duties are performed, not the fairness of a contract itself. The Court also noted that the plaintiff had failed to assert a claim under an alternative good faith and fair dealing theory, one that requires employers who terminate "without good cause" (albeit not in bad faith) to pay any compensation clearly related to employees' past services, even if not yet contractually due. Nonetheless, the Court expressed doubt that any such claim would have succeeded in light of the explicit forfeiture clause in the plan.

This case emphasizes the importance of crafting clear employment contracts, particularly commission plans. Any such plans should be in writing, distributed to employees impacted by the plan (with employees required to sign an acknowledgment of receipt), and followed carefully. Following these best practices will help insulate an employer's commission plan from legal challenges.

### Elimination of Gender-Specific Locker Rooms May Constitute Gender Discrimination

In *King v. City of Boston*, the Appeals Court reversed summary judgment in favor of the City of Boston, finding that the Boston Police

Department's failure to provide female superior officers with rank-specific locker rooms could constitute an adverse employment action.

Since about 1980, the Boston Police Department has provided superior officers with separate locker rooms in the district stations, which most superior officers considered useful for disciplinary reasons and a tangible benefit of their rank. Between 2000 and 2002, each of the female plaintiffs received promotions to superior officer positions in different district stations throughout Boston. Two of the plaintiffs' stations had separate locker rooms for female superior officers, but the spaces were used for other purposes. When they complained to the union about the lack of female superior officer locker rooms, the Department sought to eliminate all rank-specific locker rooms. The union viewed the elimination of rank-specific locker rooms as a change in working conditions and a mandatory subject of collective bargaining. The union eventually filed complaints for gender discrimination with the MCAD, challenging the elimination of the locker rooms. The third plaintiff's station had never had a female superior officer locker room, and she filed a separate MCAD complaint for gender discrimination. In February 2003, all three plaintiffs withdrew their pending complaints and filed suit against the Department in the Massachusetts Superior Court, alleging both gender discrimination and retaliation.

Upon a motion for summary judgment, the Superior Court judge determined that the Department's failure to provide rank-specific locker rooms did not constitute an adverse employment action for purposes of either the gender discrimination or retaliation claim. The judge granted the defendant's motion for summary judgment and entered a declaratory judgment authorizing the defendant to eliminate altogether rank-specific facilities. The Appeals Court reversed, finding that a reasonable fact-finder could determine that under these circumstances, the rank-specific locker rooms were a material condition or privilege of employment. According to the Court, the absence of language within the collective bargaining agreement pertaining to superior officer locker facilities did not preclude a finding that rank-specific facilities are conditions or privileges of a superior officer's employment. Furthermore, the Court held that a fact-finder could conclude that the Department's plans for implementing a rank-neutral policy were caused by, and in response to, one plaintiff's grievance and also were intended to retaliate against her and the male superior officers for supporting the complaints of their female colleagues.

This case reminds employers that changes in even incidental benefits provided to employees can be deemed adverse employment actions. Additionally, changes made to those benefits after an employee engages in protected activity may give rise to a separate claim of retaliation.

## Employee's Termination for Fraudulent Disability Claim Upheld

The Appeals Court recently held that a law firm did not commit disability discrimination when it terminated an employee with a severe spinal condition, based on the firm's "well-founded belief that she had falsely claimed disability benefits." In *Brooks v. Peabody & Arnold, LLP*, the Court upheld the trial court's grant of summary judgment in the defendant's favor because the firm substantiated a nondiscriminatory reason for the termination: Brooks had exaggerated her condition and fabricated her symptoms.

During her sixteen years as a secretary, Brooks received mostly positive performance evaluations, and although the evaluations referenced her poor attendance, prior to 2004 the firm never disciplined Brooks. Then, in October 2004, Brooks received two disciplinary warnings for absenteeism and tardiness. Thereafter, the firm received a fax from Brooks's physician stating that because of her back condition, Brooks was "disabled from all work." The firm, which knew of Brooks's condition and had provided her with accommodations, granted her a short-term disability leave on the condition that she submit to an independent medical examination (IME). The examining physician, who noted that Brooks walked with "a distinct forward bent" and used a cane, determined that she suffered "a disabling degree of pain."

The firm was suspicious of Brooks's claims because she had not previously used a cane; her disability claim had been filed immediately after the disciplinary warnings; and she took a previously-scheduled vacation to Disney World. The firm hired a private investigator, who videotaped Brooks engaging in physical activities, including performing

yard work and lifting and carrying groceries without difficulty and without a cane. In addition, despite her claim that she could not sit at a desk and type, Brooks drove forty minutes to a casino and played slots for three hours. When the employer showed the videotape to the physician who performed the IME, he opined that her presentation in his office had been a "marked embellishment" and concluded that she was not disabled from her job. The firm concluded that Brooks had misled it in order to collect disability benefits, and fired her.

Brooks argued that the defendant's recent enforcement of its attendance policy, as well as its failure to consult with her treating physician regarding the videotape, demonstrated that the firm's proffered reason was a pretext for disability discrimination. The Court disagreed and held that the defendant was not required to "engage in an exhaustive review of either the plaintiff's physical condition or . . . [her] apparent fraudulent behavior to eliminate the question of pretext" and that while the recent increased enforcement of the attendance policy might have provided evidence of pretext if the firm had terminated Brooks on those grounds, she "was terminated for an unrelated reason: because she was not in fact disabled from performing her duties."

The Court's decision clarifies that although an employer's reason for terminating an employee must be nondiscriminatory, the employer is not required to undertake an extensive investigation to support its conclusions. In addition, this case highlights the importance of clearly articulating and documenting the nondiscriminatory reason for firing an employee.

## Table of Cases

- Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008).
- Bohne v. Computer Assocs. Int'l, Inc.*, 514 F.3d 141 (1st Cir. 2008).
- Brooks v. Peabody & Arnold, LLP*, 71 Mass. App. Ct. 46 (2008).
- DeCaire v. Mukasey*, No. 07-1539, 2008 U.S. App. LEXIS 5174 (1st Cir. Mar. 11, 2008).
- King v. City of Boston*, 71 Mass. App. Ct. 460 (2008).
- Trinh v. Gentle Commc'ns, LLC*, 71 Mass. App. Ct. 368 (2008).

## Upcoming Breakfast Briefing

### June 19, 2008: "What Non-Union Employers Need To Know About the National Labor Relations Act"

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### ATLANTA

One Peachtree Pointe  
1545 Peachtree Street, N.E.  
Suite 700  
Atlanta, GA 30309-2401  
404-885-1500  
404-892-7056 fax

### BOSTON

Two Seaport Lane, Suite 300  
Boston, MA 02210-2028  
617-946-4800  
617-946-4801 fax

### CHICAGO

131 South Dearborn Street  
Suite 2400  
Chicago, IL 60603-5577  
312-460-5000  
312-460-7000 fax

### HOUSTON

700 Louisiana Street  
Suite 3700  
Houston, TX 77002-2797  
713-225-2300  
713-225-2340 fax

### LOS ANGELES

One Century Plaza, Suite 3300  
2029 Century Park East  
Los Angeles, CA 90067-3063  
310-277-7200  
310-201-5219 fax

### NEW YORK

620 Eighth Avenue  
New York, NY 10018-1405  
212-218-5500  
212-218-5526 fax

### SACRAMENTO

400 Capitol Mall, Suite 2350  
Sacramento, CA 95814-4428  
916-448-0159  
916-558-4839 fax

### SAN FRANCISCO

560 Mission Street, Suite 3100  
San Francisco, CA 94105-2930  
415-397-2823  
415-397-8549 fax

### WASHINGTON, D.C.

815 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20006-4004  
202-463-2400  
202-828-5393 fax

### BRUSSELS

Boulevard du Souverain 280  
1160 Brussels, Belgium  
(32) (2) 647 60 25  
(32) (2) 640 70 71 fax

## Boston Office Labor & Employment and Employee Benefits Attorneys

**Richard L. Alfred**  
617-946-4802  
[ralfred@seyfarth.com](mailto:ralfred@seyfarth.com)

**Anthony S. Califano**  
617-946-4925  
[acalifano@seyfarth.com](mailto:acalifano@seyfarth.com)

**Ariel D. Cudkowicz**  
617-946-4884  
[acudkowicz@seyfarth.com](mailto:acudkowicz@seyfarth.com)

**Lisa J. Damon**  
617-946-4880  
[ldamon@seyfarth.com](mailto:ldamon@seyfarth.com)

**Brigitte M. Duffy**  
617-946-4808  
[bduffy@seyfarth.com](mailto:bduffy@seyfarth.com)

**C.J. Eaton**  
617-946-4903  
[ceaton@seyfarth.com](mailto:ceaton@seyfarth.com)

**Andrew L. Eisenberg**  
617-946-4909  
[aeisenberg@seyfarth.com](mailto:aeisenberg@seyfarth.com)

**Dana L. Fleming**  
617-946-4987  
[dfleming@seyfarth.com](mailto:dfleming@seyfarth.com)

**Lynn Kappelman**  
617-946-4888  
[lkappelman@seyfarth.com](mailto:lkappelman@seyfarth.com)

**Daniel B. Klein**  
617-946-4840  
[dklein@seyfarth.com](mailto:dklein@seyfarth.com)

**Erin S. Martino**  
617-946-4927  
[emartino@seyfarth.com](mailto:emartino@seyfarth.com)

**Kristin G. McGurn**  
617-946-4858  
[kmcgurn@seyfarth.com](mailto:kmcgurn@seyfarth.com)

**Barry J. Miller**  
617-946-4806  
[bmiller@seyfarth.com](mailto:bmiller@seyfarth.com)

**Leah M. Moore**  
617-946-4990  
[lemoore@seyfarth.com](mailto:lemoore@seyfarth.com)

**Katherine E. Perrelli**  
617-946-4817  
[kperrelli@seyfarth.com](mailto:kperrelli@seyfarth.com)

**Krista Green Pratt**  
617-946-4850  
[kpratt@seyfarth.com](mailto:kpratt@seyfarth.com)

**Jessica M. Schauer**  
617-946-4952  
[jschauer@seyfarth.com](mailto:jschauer@seyfarth.com)

**Dawn Solowey**  
617-946-4800  
[dsolowey@seyfarth.com](mailto:dsolowey@seyfarth.com)

**Diane M. Soubly**  
617-946-4899  
[dsoubly@seyfarth.com](mailto:dsoubly@seyfarth.com)

**Karen A. Thompson**  
617-946-4967  
[kthompson@seyfarth.com](mailto:kthompson@seyfarth.com)

**Sarah N. Turner**  
617-946-4942  
[sturner@seyfarth.com](mailto:sturner@seyfarth.com)

*Business Immigration*  
**Salomon Chiquiar-Rabinovich**  
617-946-4805  
[schiquiarrabinovich@seyfarth.com](mailto:schiquiarrabinovich@seyfarth.com)

**Dyann DelVecchio**  
617-946-4911  
[ddelvecchio@seyfarth.com](mailto:ddelvecchio@seyfarth.com)

**John F. Quill**  
617-946-4913  
[jquill@seyfarth.com](mailto:jquill@seyfarth.com)

**Russell B. Swapp**  
617-946-4905  
[rswapp@seyfarth.com](mailto:rswapp@seyfarth.com)

*Employee Benefits*  
**Arthur S. Meyers**  
617-946-4980  
[asmeyers@seyfarth.com](mailto:asmeyers@seyfarth.com)

**Sonia Macias Steele**  
(617) 946-4854  
[sssteel@seyfarth.com](mailto:sssteel@seyfarth.com)