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Bipolar Employee's Outbursts Constitute "Egregious Misconduct" Under State Handicap Law

The Massachusetts Supreme Judicial Court (SJC) recently upheld the right of an employer to hold a handicapped employee who engages in egregious workplace misconduct to the same standard of conduct as it holds a non-handicapped employee who engages in similar misconduct. In *Mammone v. President and Fellows of Harvard College*, the SJC held that "a handicapped person who engages in egregious misconduct, sufficiently inimical to the interests of his employer that it would result in the termination of a non-handicapped employee, is not a qualified handicapped person" within the meaning of Massachusetts General Laws c. 151B (Chapter 151B). The SJC found that because Michael Mammone could not perform the essential functions of his job, it was not necessary for Harvard to show that it could not provide him a reasonable accommodation.

Mammone worked at Harvard's Peabody Museum as a staff assistant for seven years and had significant contact with the public. On at least ten separate occasions while on duty at the Museum, Mammone distributed flyers advertising his website which criticized Harvard wages, used his personal laptop to update his website, and clapped and danced to protest songs. On one occasion, Mammone spoke loudly on the telephone to the police, his family, and an attorney with the American Civil Liberties Union. Mammone refused his supervisor's request for a private meeting, and because of his disruptive conduct, he was ultimately arrested for trespassing and removed from the Museum's lobby by Harvard police.

Following his arrest, Harvard terminated Mammone's employment. Mammone sued for employment discrimination, alleging that Harvard terminated his employment because of his mental disability and failed to offer him a reasonable accommodation. In rejecting Mammone's claim, the SJC relied on its 1995 decision in *Garrity v. United Airlines, Inc.*, in which it held that a

See "Egregious Misconduct," page 2

Discrimination Claim Survives Plaintiff's Death

In *Gasior v. Massachusetts General Hospital*, the SJC recently held that an employee's death does not extinguish his employment discrimination claims, and that his estate may recover all damages that would have been available to him had he survived.

After exhausting his administrative remedies by filing a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD), Richard Gasior filed suit against Massachusetts General Hospital (MGH) in Massachusetts Superior Court, asserting a claim for handicap discrimination and seeking compensatory and punitive damages. After filing his claim, Gasior developed a terminal illness which resulted in his death one week before the case was scheduled for trial.

MGH filed a motion to dismiss Gasior's discrimination claims, arguing that Gasior's claim for discrimination under Chapter 151B did not survive his death. The Superior Court dismissed Gasior's claim for punitive damages, but denied MGH's motion as to his claim for compensatory damages. Because the Massachusetts appellate courts had never addressed these legal issues, the Superior Court also reported its decision for immediate appellate review.

On appeal, the SJC reversed the trial court and held that a claim for employment discrimination survives the employee's death in all respects. In reaching this result, the Court analogized discrimination claims to suits for breach of contract, which typically survive the plaintiff's death. Though Gasior had been an at-will employee, the Court found that the provisions of Chapter 151B, which prohibited MGH from dismissing or refusing to reinstate him because of discrimination, were an implied term of his employment with MGH. The Court further reasoned that it would undermine the remedial purposes of Chapter 151B to limit the types of remedies available to the estate of a plaintiff who died before trial.

See "Claim Survives," page 2

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Egregious Misconduct, cont'd from page 1

handicapped employee who engages in egregious workplace misconduct can be held to the same standard as a non-handicapped employee who engages in similar misconduct.

Mammone attempted to distinguish his case, contending that the *Garrity* holding should be limited to cases involving workplace misconduct caused by alcoholism or other substance dependency disorders and should not apply to misconduct caused by certain handicaps like his own bipolar disorder unless the misconduct poses a direct threat to himself or others. The SJC rejected this argument and found that nothing in Chapter 151B suggests a legislative intent to provide different protections against discrimination for persons suffering from one form of handicap (alcoholism) as compared to persons suffering from other handicaps.

The Court's decision makes clear that handicapped employees are not entitled to more protection than their non-handicapped co-workers if their workplace misconduct is sufficiently egregious. Similarly, the Court is loathe to provide greater protections to individuals with one specific handicap than it provides to all other handicapped individuals.

Claim Survives, cont'd from page 1

While this decision provides some certainty to employers regarding their continuing exposure in discrimination cases in which the plaintiff dies before trial, it raises questions about the extent to which employees may now assert contract claims that are rooted in an employer's statutory obligations. Unfortunately, the SJC did not discuss any principles that the courts might use to determine when the provisions of statutes such as Chapter 151B become terms of an implied employment contract. As result, it is now more likely that employees will assert implied contract claims in conjunction with statutory claims where they previously might not have.

SJC Declines to Expand Application of "Continuing Violation" Doctrine

In *Silvestris v. Tantasqua Regional School District*, the SJC ruled that employees cannot rely on the "continuing violation" doctrine to provide an exception to the statute of limitations on wage discrimination claims brought under Massachusetts General Laws c. 149, § 105A — the Massachusetts Equal Pay Act (MEPA). The SJC also found that pursuant to MCAD's rules, the statute of limitations for filing such claims may be tolled when the employer treats a letter or other communication by a potential plaintiff as a grievance.

Joanne Silvestris and Valerie Goncalves — both teachers at Tantasqua Regional High School — first suspected in September 1998 that there was a disparity in pay between them and similarly situated male teachers after speaking with male co-workers about their starting salaries. They submitted a letter to the teachers association expressing concern about perceived unequal treatment, which was treated as a grievance. Months later, they received confirmation of the difference in pay. Subsequently, in July 1999, they filed discrimination charges with the MCAD alleging that the school district had violated both Chapter 151B and the MEPA by giving them less credit for prior work experience than it gave male teachers, which resulted in their receiving lower starting salaries than their male co-workers. They subsequently sued in Superior Court, and, at trial, prevailed on their MEPA claims.

On appeal, the school district argued that the plaintiffs' MEPA claims were barred by the then applicable six-month statute of limitations. The plaintiffs countered that the continuing violation doctrine exempted their claims from the ordinary limitations period. The SJC rejected the plaintiffs' argument and explicitly refused to expand the scope of this narrow exception.

The continuing violation doctrine acts as a limited exception to the limitations period for discrimination claims involving a series of related events that must be viewed in their totality in order to assess adequately their discriminatory nature and impact, such as those premised on a hostile work environment. The SJC held that this "totality of events" approach is not applicable to claims of unequal compensation because any alleged discrimination can be identified upon examination of an individual paycheck.

The SJC ruled, however, that the MCAD charge was timely because the plaintiffs' letter outlining their complaints was treated as a grievance. The Court concluded that under the MCAD rules, the limitations period was tolled during the pendency of the grievance.

The SJC's decision provides important clarification on the limited applicability of the continuing violation doctrine and brings Massachusetts law more in line with federal law on this issue.

The New Massachusetts Health Care Law

On April 12, 2006, the Massachusetts Legislature passed landmark legislation (the Act), providing access to health care for its residents. The Act imposes four main obligations on employers:

- Every employer "doing business" in Massachusetts and each employee must execute a disclosure form in which they indicate whether (i) the employer has offered to pay for or arrange for health care insurance; (ii) the employee has accepted or declined such coverage; and (iii) the employee has an alternative source of coverage.
- "Non-providing" employers (other than those with ten or fewer employees, those with collectively bargained plans, or those offering coverage to employees who decline the offer) will be assessed with a "free rider surcharge" equal to a portion of the state's cost of providing health benefits to the employer's uninsured employees if any employee or his or her dependent receives free health services more than three times in one year, or the employer has five or more instances in one year of employees or their dependents receiving free health services. The first $50,000 of "free care" in a year is exempt from the surcharge.
- Massachusetts employers with more than ten employees, other than non-profits staffed only by volunteers and sole proprietors, must maintain a cafeteria health care plan that satisfies Section 125 of the Internal Revenue Code and the rules and regulations promulgated by the newly established "Commonwealth Health Insurance Connector" (the Connector). Each employer must file a copy of its cafeteria plan with the Connector.
- Massachusetts employers with more than ten employees must choose whether to pay an assessment of approximately $295 per employee to the new Commonwealth Care Fund, or to offer or arrange for a group health care plan to which it makes a "fair share contribution," as yet undefined by regulations.

Particular provisions of the Act may trigger ERISA preemption issues because courts generally find that ERISA preempts state laws that require the establishment of an employee benefit plan, or create remedies that duplicate, supplement, or supplant ERISA's civil enforcement scheme.

The new legislation requires further clarification through forthcoming regulations. Employers will need to review their existing health care offerings to ensure compliance with the Act.

Harassment Statute Does Not Apply to Volunteers

The SJC affirmed dismissal of a statutory sexual harassment claim brought by a volunteer at a town-operated "swap shop." In *Lowery v. Klemm*, the SJC clarified the rights of non-employees and held that the general sexual harassment statute, Massachusetts General Laws c. 214, § 1C (Chapter 214), does not apply to volunteers. The SJC, however, confirmed that volunteers retain their common law and other statutory protections against harassment.

In this case, the plaintiff claimed that the facility's gatekeeper and land supervisor had made frequent sexual advances toward her over a three-year period. She repeatedly asked him to stop, but eventually the town discharged her as a volunteer and issued a no-trespass order barring her from the facility.

The plaintiff sued the alleged harasser under Chapter 214, which provides that "[a] person shall have the right to be free from sexual harassment as defined in" Chapters 151B and 151C. The plaintiff argued that the term "person" in Chapter 214 was broad enough to encompass volunteers.

The Superior Court and the SJC disagreed with this argument. Noting that Chapter 214 incorporated the definition of harassment in Chapter 151B (which applies to employers with six or more employees) and Chapter 151C (which applies to educational institutions), the SJC ruled that Chapter 214 provided statutory protection from "sexual harassment that affects a person's employment or education." The SJC rejected the argument that Chapter 214 is duplicative of Chapter 151B, explaining that Chapter 214 filled a gap by covering employees who are not protected by Chapter 151B because they work for an employer with fewer than six employees.

Although the SJC's ruling narrows the applicability of Chapter 214, it does not prevent a volunteer from seeking legal redress for sexual harassment. Volunteers retain the right to bring a claim under the state civil rights statute, or may assert a common law claim based on the sexually harassing conduct. However, volunteers may not pursue a complaint before the MCAD because the MCAD does not have jurisdiction over such claims. Those claims must be brought in court, where the litigation process is more complex than that of the MCAD.

Arbitration Agreement Provision Barring Class Actions Found Unconscionable

In *Skirchak v. Dynamics Research Corp., Inc.*, the U.S. District Court for the District of Massachusetts (District Court) recently held that a waiver of the right to file a class action contained in an arbitration agreement was unconscionable, and, therefore, unenforceable.

On November 25, 2003, Dynamics Research Corporation sent a company-wide e-mail announcing the introduction of a new Dispute Resolution Program (Program), effective December 1, 2003. The Program required employees to submit any work-related dispute to binding arbitration rather than seeking redress in court. It also required employees to waive their right to assert class action claims, and provided that arbitrators only had authority to consider claims brought on an individual basis. The e-mail provided a link to the actual text of the Program.

Following the implementation of the Program, two employees filed a class action suit against the Company, alleging violations of the Fair Labor Standards Act (FLSA). The Company moved to dismiss the suit based on the provisions of the Program, arguing that the employees had waived their right to pursue claims on behalf of themselves and others. In denying the Company's motion, the Court found that the employees had not agreed to the Program and that the particular provision at issue was not enforceable.

The Court found that the use of e-mail to announce the Program created "significant notice problems such that the plaintiffs cannot be held to have knowingly agreed to waive their right to pursue class actions." For example, the e-mail did not state that acceptance of the Program was a condition of continued employment, nor did it advise employees that their return to work on December 1, 2003, would constitute acceptance of the Program. Further, the Company did not track whether employees opened the e-mail and followed the link to view its contents, nor did it request a signature or e-mail reply to verify their consent to be bound by the Program.

On the issue of substantive unconscionability, the Court described the class action bar as "so one-sided as to be oppressive." The Court found that the bar might have the effect of contravening the principle underlying class actions and chilling the effective protection of interests common to a group. Further, the Court found that requiring an employee to waive prospectively his or her statutory rights to sue in order to obtain or maintain employment was inconsistent with the FLSA's purpose of protecting the lowest paid workers in the nation. The Court also expressed concern that a bar on class actions would circumscribe the legal options of these workers because they might be unable to afford to pursue their claims individually.

This case highlights the difficulties employers face in effectively implementing mandatory arbitration policies that significantly change employee rights. Further, employers who seek to implement these policies through electronic means are well advised to create a mechanism that ensures employees acknowledge receipt and acceptance of the terms of such policies.

USERRA Provides Broader Protection Than Its Predecessor

In *McLain v. City of Somerville*, the District Court recently held that an employer is liable for its failure to hire in violation of the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) where the employer rejected a prospective employee due to his unavailability caused by his military service.

The facts of this case illustrate the broad protection afforded to individuals under USERRA. McLain enlisted in the United States Army for a term of service that ended in January 2002. During his tenure in the Army, McLain applied for and was selected to fill one of five patrol officer vacancies in the City of Somerville's Police Department. His offer was contingent on his ability to attend mandatory police academy training in October 2001. Ultimately, Somerville refused to hire McLain because he would not be released from the Army in time to attend the October training session. McLain filed suit against the City claiming violation of USERRA.

Relying on the plain language of the statute, the District Court held that Somerville violated USERRA by failing to hire McLain. Somerville denied employment to McLain because of his active duty obligations with uniformed services. Because USERRA not only prohibits discrimination based on a person's status as a member of uniformed services, but also prohibits discrimination based on an individual's duties and obligations that arise in connection with membership in uniformed services, the Court found that statute clearly encompassed McLain's active duty with the Army.

While sensitive to the reality that USERRA may require employers to delay hiring, the Court refused to read an "undue hardship" burden provision into the statute despite the presence of a similar provision in USERRA's predecessor, the Veterans' Reemployment Rights Act of 1968.

The Court also rejected the City's argument that McLain's claim was not timely. The Court noted that USERRA lacks a statute of limitations and expressly disclaims the applicability of any other statute of limitations. As a result, the timeline for potential suits

is governed by the equitable doctrine of laches. The Court found that McLain's three-year delay in filing suit was not unreasonable. Moreover, because Somerville provided no evidence of prejudice caused by McLain's delay in filing suit, the doctrine of laches did not bar his claims.

As an issue of first impression in the District Court, this case illustrates the broad coverage afforded to individuals in the uniformed services by the plain language of USERRA.

Superior Court Affirms MCAD's Award of Emotional Distress Damages

In *Wilfert Brothers Realty Co. v. Massachusetts Commission Against Discrimination*, the Superior Court held that the MCAD has jurisdiction over two separate employers who act as a "joint employer," where the individual employers each had fewer than six employees and therefore were not individually within the MCAD's jurisdiction. The Court also upheld an MCAD award of emotional distress damages in an employment discrimination claim.

David Keeling filed a complaint with the MCAD alleging that his employer, Wilfert Brothers Realty Company, discriminated against him and terminated his employment based on his disability. The MCAD hearing officer found that Wilfert Realty had discriminated against Keeling and awarded, among other things, $35,000 for emotional distress damages. The full Commission affirmed the decision and further awarded Keeling attorneys' fees and costs. Wilfert Realty sought judicial review of the Commission's decision in Superior Court.

The Superior Court affirmed the Commission's decision. The Court rejected Wilfert Realty's claim that the MCAD did not have jurisdiction over the Company because it had fewer than the statutorily-mandated six employees. The Court held that the MCAD properly combined the employees of Wilfert Realty and Wilfert Woodworking when it found that both entities were Keeling's joint and single employer. Wilfert Realty and Wilfert Woodworking acted as Keeling's joint employer because they shared control over his work and directed him in the details of his job. Moreover, both companies acted as a single employer because they had the same business address, their employees worked on the same tasks, and the employees of both were promoted and directed by the same individual.

The Court, relying on the SJC's 2004 decision in *Stonehill College v. MCAD*, also upheld the Commission's award of emotional distress damages. The Court held that emotional distress damages can be sustained in discrimination cases, absent proof of physical injury or psychiatric consultation, only if the award is based on a consideration of factors: (1) the nature, character, and severity of the harm suffered; (2) the length of time the complainant has suffered and reasonably expects to suffer; (3) whether the complainant attempted to mitigate the harm; and (4) whether there is a sufficient causal connection between the unlawful actions and the emotional distress. In this case, the Court deferred to the Commission's factual finding that these criteria were met.

This case demonstrates that, following the *Stonehill College* decision, awards of emotional distress damages are permissible where there is a finding of discrimination, evidence of harm, and a causal connection between that harm and the discriminatory conduct.

2006 Edition of Federal and State Employment Discrimination Laws in the United States and 2006 Class Action Report

Each year Seyfarth Shaw's Labor & Employment Practice Group prepares a survey of the federal and state employment discrimination laws in the United States. The 2006 edition contains summaries of new legislation enacted nationwide, which became effective during 2005 or as of January 1, 2006, and is now available.

Seyfarth Shaw also recently prepared a study examining all class action rulings by federal and state courts involving workplace issues in 2005. Organized on a circuit-by-circuit and state-by-state basis, the report analyzes all 209 rulings issued over the past twelve months in workplace class actions.

These reports are available in CD-ROM format. To request copies, send an e-mail with your complete contact information to: seyfarthshaw@seyfarth.com.

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Table of Cases

Garrity v. United Airlines, Inc., 421 Mass. 55 (1995).

Gasior v. Massachusetts Gen. Hosp., 446 Mass. 645 (2006).

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Upcoming Breakfast Briefings

July 26, 2006: Religion, Spirituality and Faith in the Workplace

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Next *Massachusetts Employment & Labor Law Report:* **September 15, 2006**

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