



Labor & Employment Law Section

Fall 2010 Newsletter

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Section Co-Chairs' Corner



Leigh Panettiere



Terence McCourt

We are pleased to write this letter as co-chairs of the Labor & Employment Section. The Section is already off to a great start. We had an extremely successful “kick-off” event on October 12, 2010. We had a huge turnout, and were excited to be able to present as special guests the new Chairman and the new Commissioner of the Massachusetts Commission Against Discrimination. Commissioner Sunila George was unable to attend because of an illness, but Chairman Julian Tynes and Commissioner Jamie Williamson addressed the crowd graciously, and took numerous questions from the section members present at the event. The L&E kickoff is always a successful event, but this year’s was perhaps the best in recent memory.

We have a full slate of educational seminars scheduled for this year, in addition to monthly brown bags offering the latest in legal developments of interest to the section. Our Brown Bags are traditionally well-attended, and this fall’s brown bags on changes to the personnel records law, the CORI law, and the non-compete law have continued that tradition. On Tuesday, November 9, 2010, the Legislation Committee presented a major CLE called “Legislation – Year In Review and What Is To Come,” which drew a great crowd and sparked much discussion about the way labor and employment lawyers will respond to the challenges presented by the legislative changes of the past year. On Tuesday, December 7, 2010 at 4:00, the Labor Committee will present its annual “Labor Basics” CLE, which this year focuses on arbitration. Our fall CLEs are a must for labor and employment practitioners, and “Labor Basics” is particularly recommended for those new to the field of labor law. For more details on the section’s education seminars and brown bags scheduled for the coming year, check out the calendar on the BBA’s web site, at: <https://www.bostonbar.org/ebusiness/Meetings/EventsCalendar.aspx>.

The public service committee continues its work to bring the new L&E Section blog to its members. Consistent with the BBA’s communications initiative, the Labor & Employment Section has taken up the challenge to use a blog to keep the section, the BBA membership, and the

community at large informed on the latest developments. The blog features case notes, legislative updates, practice-related tips and articles, career news, job openings, and event reminders for the Section, the membership, and the community. If you are interested in getting involved in the Blog Project, send an email to nicole@shepherd-lawgroup.com. The blog can be found at: <http://www.bbaworkplace.com>.

This year the section has added new substantive subcommittees to the Steering Committee, including Employment Discrimination, Alternative Dispute Resolution, Wage & Hour, and Non-Compete.

Finally, we are proud to announce the section’s pro bono efforts to provide legal advice to the brave men and women who serve us in the U.S. military. The section has been presented with a unique opportunity to volunteer our services at “Yellow Ribbon Events,” which are scheduled throughout the next year. Veterans and their families are invited to attend these “Yellow Ribbon Events” and seek legal and other advice regarding the impact their military service has on their lives. The guidance of labor and employment lawyers is often sorely needed post-deployment. The organizers of this event can offer us an opportunity to either advise returning soldiers directly, or address the group with general advice. Our introductory November 1, 2010 training session will be followed by a more intensive training, conducted by the Massachusetts Department of Labor, in January, at which we will discuss USERRA and other labor and employment statutes that are typically implicated when a returning Veteran seeks services. If you are interested in either attending the next training or volunteering your services, please contact Leigh Panettiere, Co-Chair of the BBA’s Labor & Employment Section, at lpanettiere@sandulligrace.com, or (617) 523-2500 Ext. 18. This is obviously an extremely important venture, and one we are determined to make a success.

The L&E Section is continuing its efforts to involve the BBA’s membership in the activities of the L&E Section leadership. Our steering committee is richly populated with a diverse, hardworking group of labor and employment professionals who are developing programs to keep the section up to date on developments in labor and employment law. We invite members of the section to contact us and volunteer to serve on subcommittees. Working on a subcommittee provides an opportunity to contribute to the section’s educational efforts and collaborate with fellow labor and employment attorneys.

Please stay tuned to the L&E Section newsletter and blog, and stay active in your section.

Terry and Leigh

Judicial Update

Christopher Powell and Brenda Carr, Ropes & Gray LLP

Lewis v. City of Chicago, 130 S. Ct. 2191 (2010).

In 1995 the City of Chicago administered a written exam to firefighter applicants. The City established three categories of exam scores: (1) applicants with scores below 65 failed the exam; (2) applicants with scores between 65 and 88 were considered “qualified”; and (3) applicants with scores between 89 and 100 were considered “well-qualified”. The City announced that it would choose its candidates at random from the list of well qualified applicants, but would keep “qualified” applicants on the eligibility list, to be considered for hire only if the pool of “well-qualified” applicants was exhausted. On May 16, 1996, and again on October 1, 1996, the City selected applicants from the “well-qualified” portion of the list to advance to the next step of the hiring process.

In March of 1997 several African-American applicants who had scored in the qualified range, filed charges with the Equal Employment Opportunity Commission, and subsequently brought a class action claiming that selecting firefighters solely from the “very qualified” pool had a disparate impact on African-Americans in violation of Title VII. The City moved to dismiss on the grounds that the suit was time-barred because the applicants had not filed their charge with the EEOC within three-hundred days of the discriminatory act—which the City claimed was the creation of the three-category eligibility list. The District Court denied the City’s motion and later found for the class on the merits. On appeal, the Seventh Circuit reversed, accepting the City’s theory. The Seventh Circuit reasoned that the later hiring decisions were not new discriminatory acts; therefore, the plaintiffs’ claims were time-barred.

The Supreme Court reversed, holding that a plaintiff may assert a disparate impact claim challeng-

ing an employer’s later application of a previously-adopted practice. The Court reasoned that, each time the City selected a new class of firefighters, it excluded applicants who scored less than 89 on the exam. Such a selection criterion fell squarely within the meaning of the term “employment practice” under Title VII. The City argued that only the initial creation of the list in 1996 could have given rise to a disparate impact claim and that subsequent hiring from the list was merely the “present effect of past discrimination”, which could not form the basis for a timely claim under cases such as Ledbetter v. Goodyear Tire & Rubber Co., 550 US 618 (2007). The Court rejected that argument, clearly distinguishing disparate treatment cases like Ledbetter, in which one or more discriminatory decisions have recurring effects, from disparate impact cases, in which an employment practice producing a discriminatory effect is repeated. Because discriminatory treatment cases require proof of deliberate discrimination within the 300-day period, it is possible for claims pertaining to a discriminatory decision in the past to become time-barred even though the decision has continuing effect. The “present effect of past discrimination” rubric is inapposite to a disparate impact claim, the Court held, where the plaintiff is able to show the application of an “employment practice” during the 300 day period, as was the case in Lewis.

City of Ontario v. Jeff Quon, 130 S.Ct. 2619 (2010).

Jeff Quon, an employee of the City of Ontario, California, filed an action against the City claiming that it violated his 4th Amendment rights by obtaining and reviewing transcripts of his messages sent via a pager provided by the City. The City’s contract with the pager service provided gave each pager a monthly character allotment. When several officers exceeded their allotments

in consecutive month, the City's chief of police sought to ascertain whether the allotment was too low. The Chief reviewed two months of pager message transcripts for each officer to determine whether the overages were caused by work-related messages or personal messages. During the audit, the Chief discerned that many of Respondent Quon's messages were not work-related and were also sexually explicit. Quon was ultimately disciplined for his misuse of the pager provided by the City.

Quon and other respondents filed suit alleging violation of their 4th Amendment rights and of the Federal Stored Communications Act. The District Court determined as a matter of law that the officers had a reasonable expectation of privacy in the messages. However, the jury determined that the City had acted with the legitimate purpose of determining the efficiency of the character limitation to ensure officers were not paying for work-related texts. Consequently, the District Court concluded that the search was reasonable and did not violate the 4th Amendment. The Ninth Circuit reversed, finding that the search was not reasonable because it was not the "least intrusive" means of conducting the audit.

For the purposes of its review, the Supreme Court assumed that the chief's review of the transcripts constituted a search and assumed that Quon and the other officers had an expectation of privacy in the messages. Nevertheless, the Court concluded that the search was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope. The Court stated that the Ninth Circuit's "least intrusive means" test was inconsistent with the Court's earlier precedents.

However, the Court did not fully resolve the question of the correct analysis of 4th Amendment claims by employees of the United States, which was left unsettled after its decision in *O'Connor v. Ortega* 480 U.S. 709 (1987) in which a fractured Court articulated three approaches to the issue.

Granite Rock v. International Brotherhood of

Teamsters, 130 S.Ct. 2847 (2010).

The employer, Granite Rock, brought an action against Local 287 (the "Local") and the parent union, the Teamsters, seeking damages for breach of a collective bargaining agreement by the Local and tortious interference by the Teamsters in that agreement.

In June 2004, the Local led a strike against Granite Rock in California after negotiations broke down over a successor to an expired collective bargaining agreement. In July, the parties settled on a new agreement that contained both no-strike and arbitration clauses, but could not agree to an independent back-to-work agreement holding the union members harmless from strike-related damages. The Teamsters ordered the Local to continue striking until an agreement was reached, which led Granite Rock to declare the Local to be in violation of the new agreement. The unions then commenced a company-wide strike that included members of other Teamsters locals. Granite sued the Teamsters and the Local under §301(a) of the Labor Management Relations Act. IBT and the Local argued that the new collective bargaining agreement had not been ratified by a vote of local's members at the time Granite Rock filed its lawsuit, arguing, therefore, that the no-strike clause in that agreement could not provide the basis for Granite's claim.

The District Court dismissed the tortious interference claim against the Teamsters, but sent the ratification question went to a jury, which determined that the collective bargaining agreement had been ratified in July, before Granite Rock filed its lawsuit. Based upon the jury's decision, the District Court then remanded the strike dispute for arbitration. The Ninth Circuit affirmed the dismissal of the tortious interference claim but found that the collective bargaining agreement's ratification date was an issue for an arbitrator not the court.

Upon review, the Supreme Court held that the ratification date was a question for the court, not

an arbitrator. The Court held that the ratification question required a determination as to whether a contract was ever formed, a question that was for the court. It rejected the unions' claim that the presumption in favor of arbitration of labor disputes should be applied, reasoning that the presumption applies only after a judicial conclusion that the parties' express agreement to arbitrate was validly formed, is legally enforceable and is best construed to encompass the dispute. Here, the ratification question concerned the collective bargaining agreement's very existence; if the collective bargaining agreement were not valid, then the agreement's requirement that disputes "[arising] under" the agreement be arbitrated could not be enforced.

The Court also held that the lower courts had been correct to deny recognition of a common law tortious interference action under §301. Virtually every Circuit Court of Appeals that had considered the matter had also rejected such a claim. The Court agreed with the reasoning applied in a Seventh Circuit case, Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993), that the ability of federal courts to fashion a federal common law for the enforcement of collective bargaining agreements under Textile Workers v. Lincoln Mills of Ala., 353 US 448 (1957) did not extend to the creation of tort claims. However, the Court did not entirely shut the door on the future creation of a tortious interference cause of action by emphasizing that its holding was influenced, in significant part, by the failure of Granite Rock to demonstrate that it had no other effective remedy for the Teamsters' conduct in this matter, and the Court's agreement with Granite Rock that such conduct did "seem to strike at the heart of the collective bargaining process federal labor laws were designed to protect."

Martino v. Forward Air, Inc., 609 F.3d 1 (1st Cir 2010).

Edward Martino worked in the freight forwarding industry for many years. In 2003, he was injured on the job and unable to work for two years, dur-

ing which time he collected workers' compensation. In 2005, he applied for a new position with Forward Air. The application process included consent to a background check as well as an interview during which Martino was asked about the two-year gap in his employment. Martino disclosed information about his injuries and that he had collected workers' compensation. Ultimately, Forward Air decided not to create the new position, citing business reasons and informed Martino of the decision.

Martino brought various federal and state discrimination claims against Forward Air, among them a claim that Forward Air's pre-employment inquiry regarding Martino's workers' compensation history violated G.L. Ch. 151B, § 16(3). The District Court dismissed that claim, reasoning that the illegal pre-employment inquiry was simply evidence of discriminatory intent and that there was no independent cause of action for such an inquiry. At trial, the jury found that Forward Air did not discriminate against Martino because the company had legitimate business reasons for not hiring him, namely its decision not to create the position. Martino appealed the dismissal of his impermissible inquiry claim under Chapter 151B. Upon review, the First Circuit noted that it need not decide the viability of a cause of action based solely on illegal pre-employment inquiry because the jury determined that Forward Air had legitimate business reasons for not hiring him, and Martino had not alleged any other cognizable injury.

The tenor of the First Circuit's decision in Martino suggests that the Court of Appeals would acknowledge a private right of action for illegal pre-employment inquiry under Chapter 151B if presented with the right set of facts. The Court of Appeals discussed in detail the MCAD's amicus brief, which argued that 151 §4(6) includes a private cause of action for illegal pre-employment inquiries. Further, the Court explicitly stated that any hypothetical claim would also have to demonstrate actual harm. These inclusions lay the

stage for a properly pleaded and factually supported case alleging pre-employment inquiry as an independent cause of action.

Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass 2010).

This case (and a companion case, Commonwealth v. HHS, summarized next) challenged the constitutionality of Section 3 of the so-called Defense of Marriage Act (“DOMA”). The plaintiffs in the cases are numerous same-sex couples and several survivors of same-sex spouses, all of whom were married in Massachusetts. Plaintiffs sought access to a variety of federal marriage-based benefits, such as health benefits programs, retirement benefits, and social security benefits. Several plaintiffs also sought the ability to file federal income taxes jointly with their spouses. The defendants were federal employers of the plaintiffs or their spouses and federal agencies that administered the benefits sought, including the Office of Personnel Management, U.S. Postal Service, the Postmaster General, the Commissioner of Social Security Administration, the Secretary of State, and the U.S. Attorney General.

Defendants and plaintiffs cross-moved for dismissal and summary judgment. The Court denied defendant’s motion to dismiss and allowed the plaintiffs’ motion for summary judgment, on all but one claim, concluding that Section 3 of DOMA violates the equal protection principles within the Due Process Clause of the Fifth Amendment. Specifically, the Court found that DOMA is not directed to any “identifiable legitimate purpose or discrete [government] objective” and that Congress undertook the classification for a purpose that “lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves.”

The District Court stayed the effect of its pending appeal to the First Circuit. A briefing schedule has not been set.

Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services, 698 F. Supp. 2d 234 (D. Mass 2010).

This is the companion case to Gill, in which the Commonwealth argued that Section 3 of the DOMA violated the 10th Amendment and the Spending Clause. The Commonwealth, which legalized same-sex marriage in 2004, was prohibited by DOMA from allowing same-sex married couples to participate in a variety of state-run programs that depend upon federal aid.

The Commonwealth contended that DOMA intrudes on areas of state authority by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funding. The court granted the Commonwealth summary judgment and held that Congress exceeded its authority under the Spending Clause when it enacted DOMA because DOMA encourages the Commonwealth to violate the equal protection rights of its citizens by conditioning the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples. The Court also held that DOMA violated the 10th Amendment because it impeded the Commonwealth’s ability to define the marital status of its citizens.

As in Gill, the effect of the District Court’s decision has been stayed pending review by the First Circuit. A briefing schedule has not been set.

Global NAPs v. Awiszus, 457 Mass. 489 (2010).

This legal malpractice case teaches two important lessons: (a) notwithstanding prior guidance from the MCAD to the contrary, the Massachusetts Maternity Leave Act (MMLA) does not protect employees whose employees take maternity leave longer than 8 weeks; and (b) it is important to timely file appeal notices.

In the underlying case, Global NAPs was represented by the respondent attorneys, Awiszus and others, in connection with an employment discrimination claim under the MMLA, Mass. Gen. Laws. ch. 149, § 105D. The plaintiff employee alleged that Global NAPs had agreed to give her more than eight weeks of maternity leave and then subse-

quently terminated her employment. At trial and the jury found for the plaintiff-employee. The defendant respondent attorneys filed Global Naps' notice of appeal late; as a result, GlobalNAPs was unable to obtain appellate review of the adverse verdict. Subsequently, Global NAPs brought this legal malpractice action against its counsel and alleged negligence, breach of contract and loss of chance. After the Superior Court granted the attorney's motion for summary judgment, the Supreme Judicial Court took the case on direct appellate review.

To determine whether summary judgment in favor of the defendants was appropriate in the malpractice suit, the SJC had to determine the substantive merits of the underlying discrimination action. Specifically, the Court had to determine whether the MMLA would protect an employee whose employer voluntarily agrees to provide more than the required eight weeks of maternity leave. The Court concluded that the plain language of §105D provides an employee only eight weeks of protection. As a result, after the employee had remained out of work for more than eight weeks, she was no longer protected by the MMLA. The SJC determined that the MCAD's guidelines, which stated that an employer had a duty to inform an employee if the employer would not extend maternity leave beyond 8 weeks, did not have the force of law and were inconsistent with §105D. The Court recognized that an employee may reach a separate arrangement with her employer which allows her to remain on leave beyond the eight weeks mandated by the MMLA, but held that those rights are grounded in contract, not in the MMLA.

In light of the Supreme Judicial Court's ruling, the MMLA clearly only protects an employee for up to eight weeks of leave. If an employee, not covered by FMLA, alleges that her employer agreed to more than eight weeks of leave, she must assert an independent right of action for breach of contract. And, while the MCAD's guidelines may be instructive, this case is a reminder that they do not carry the force of law.

Massachusetts Nurses Association v. Commonwealth Employment Relations Board, 77 Mass. App.Ct., 128(2010).

The Massachusetts Nurse Association (the "MNA"), representing nurses and other health care workers at the Taunton State psychiatric hospital (the "Hospital"), filed a grievance with the Commonwealth Employment Relations Board (the "Board") alleging that the Hospital committed a prohibited labor practice when it required forty workers to remove their union T-shirts. The Board dismissed the charge prior to an evidentiary hearing for lack of probable cause citing special circumstances. The T-shirts in question depicted a skeleton and the phrase "Skeleton Crew" on the front; on the back was shown a "thumbs down hand" with the phrase "MNA Unit 7 Staffing Levels Cut to The Bone." Based upon written submissions by both sides, the Board concluded that although wearing the union insignia was protected by G.L. c. 150E § 2, the Hospital's status as a psychiatric facility and evidence presented by the Hospital created special circumstances that supported the Hospital's concern that the T-Shirts might have incited patient violence. The MNA appealed to the Board's decision.

The Appeals Court vacated the Board's order, and remanded the matter to the Board for an evidentiary hearing. Although the Hospital's dress code prohibited "provocative dress, such as clothing that displays images that could be upsetting", the court found that special circumstances rarely exist unless the employer has "a comprehensive ban on all nonstandard adornments." Here, the record lacked any indication about how the Hospital's dress code had been enforced in the past. Also, the court found that the affidavits supporting the Hospital's position were not sufficient to demonstrate that the image or message would have been upsetting to the patients. One Hospital affiant was not a health care professional and the other, a psychiatrist, appeared to form her opinion without actually viewing the T-shirt. Consequently, the Appeals Court held that the Board had an inadequate basis for its prehearing dismissal.

Agency Update

EEOC

Abercrombie & Fitch Sued For Religious Discrimination

The EEOC has brought a claim against Abercrombie & Fitch, Co. alleging that it violated federal law when it refused to hire a Muslim job applicant because she wore a hijab (religious head scarf). In early 2008, an 18 year-old job applicant wore a colorful headscarf to her interview, in accordance with her religious beliefs. According to the EEOC, the manager at Abercrombie & Fitch asked if the applicant's religious beliefs required her to wear the scarf, then marked "not Abercrombie look" on the interview form. EEOC San Francisco District Director Michael Baldonado stated, "Abercrombie & Fitch used its brand to exclude and discriminate again, this time against a Muslim teen who was honoring her faith while following her love of fashion." The EEOC claims that Abercrombie failed to provide reasonable accommodation to the applicant's religious beliefs.

A full version of article is available at: <http://www.eeoc.gov/eeoc/newsroom/release/9-1-10.cfm>

EEOC Sues United Road Towing for Discriminatory Medical Leave Policy

The EEOC filed a new lawsuit, alleging that United Road Towing violated federal anti-discrimination law by enforcing an inflexible medical leave policy.

According to the lawsuit, United Road Towing unlawfully terminated qualified employees after they used the full 12 weeks of leave allowed under Family Medical Leave Act (FMLA). The EEOC also argues that United Road Towing failed to re-hire employees with disabilities when they reapplied after being unlawfully terminated under the inflexible leave policy. The EEOC alleges that each of these practices violate the Americans With Disabilities Act (ADA).

A full version of the article is available at: <http://www.eeoc.gov/eeoc/newsroom/release/9-30-10j.cfm>

OSHA

OSHA announces interim final rules on whistleblower procedures

The U.S. Department of Labor's Occupational Safety and Health Administration published in the interim final rules in the Aug. 31 Federal Register that help protect workers who voice health, safety, and security concerns. The regulations, which establish detailed procedures for worker retaliation complaints, allow filing by phone as well as in writing. Assistant Secretary of Labor for OSHA, David Michaels said: "When workers believe their employers are violating certain laws or government regulations, they have the right to file a complaint and should not fear retaliation. Silenced workers are not safe workers...[c]hanges in the whistleblower provisions make good on the promise to stand by those workers who have the courage to come forward when they believe their employer is violating the law and cutting corners on a variety of safety, health and security concerns in the affected industries."

A full version of the article is available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18249

NLRB

NLRB Acting General Counsel streamlines process to seek federal injunctions when employees are fired during union organizing campaigns

The NLRB recently kicked off an initiative to streamline the Agency's response to charges alleging that employees are fired while participating in a union organizing campaign. The changes provide that, in all meritorious cases, the NLRB General Counsel's will consider seeking an injunction compelling employers to reinstate all fired workers pending resolution of the underlying unfair labor practices case. The new initiative also creates new timelines

to streamline the process.

NLRB rules that union ‘bannering’ not unlawful

The NLRB recently ruled that union practice of displaying large banners at a secondary employer’s business does not violate U.S. law because it is not coercive. The August 27 decision applied to three Arizona cases in which union carpenters held 16-foot-long banners near three businesses to protest the use of certain construction contractors that performed work for the owners. The unions protested those contractors because they alleged that the contractors paid substandard wages and benefits to their employees.

A full version of the article is available at: http://www.nlr.gov/about_us/news_room/index.aspx

DOL

Department of Labor issues proposed rule that revises wage calculations for H-2B program

The U.S. Department of Labor’s Employment and Training Administration has proposed a rule that would improve the H-2B temporary nonagricultural worker program and help protect American workers. The proposed rule specifically focuses on the calculations used to set wage rates for those workers. The H-2B program allows the entry of workers into the United States when other qualified American workers are not available. It also allows the entry of those foreign workers when the employment of such workers will not adversely affect the wages or working conditions of similarly employed American workers. The proposed regulation requires employers to pay H-2B and associated American workers wages that meet or exceed the highest of: (1) the prevailing wage, (2) the federal minimum wage, (3) the state minimum wage or (4) the local minimum wage.

A full version of the article is available at: <http://www.prnewswire.com/news-releases/us-labor-department-issues-proposed-rulemaking-revising-wage-calculations-for-h-2b-program-104298023.html>

EEOC

MCAD Rules that UPS Discriminated Against Employee With Disability

The Massachusetts Commission Against Discrimination (MCAD) has determined that United Parcel Service (UPS) discriminated against a long-term employee on the basis of his disability because it refused to grant him the reasonable accommodation of transferring him to other available positions on different shifts, according to the recommendations of his doctor. Due to UPS’s failure to reasonably accommodate his disability, the MCAD found that the employee was constructively discharged from his position. As a result, the MCAD awarded the employee over \$800,000 in damages including front pay.

A full version of the article is available at: <http://www.mass.gov/mcad/documents/UPS%20press%20release.pdf>

Massachusetts Appeals Court Reinstates MCAD Emotional Distress Award

The Massachusetts Appeals Court in *City of Boston v. MCAD*, the reinstated an MCAD award of \$195,000 in emotional distress damages to Complainant, Diane Sabella, after the Superior Court reduced the award to \$50,000. Ms. Sabella initially prevailed in the MCAD on her claims alleging disability discrimination against the City of Boston. The MCAD awarded her, *inter alia*, \$195,000 for emotional distress. The City of Boston then appealed to the Superior Court, which reduced the emotional distress award from \$195,000 to \$50,000. The MCAD then appealed to the Massachusetts Appeals Court, which reversed the decision of the Superior Court. The Appeals Court concluded that the Superior Court judge’s ruling was in error, as she impermissibly “substitute[d] her valuation of the harm for that of the [MCAD] hearing officer.”

A full version of the article is available at: <http://www.mass.gov/mcad/documents/Sabella%20decision%20press%20release.pdf>

Amendment to Massachusetts Personnel Records Imposes Significant New Burdens on Employers

Martha J. Zackin and Paula A. Lyons

Recently, the Massachusetts Personnel Records Law was amended to require employers to notify an employee within 10 days of any addition to his or her “personnel record” of “any information to the extent the information is, has been used or may be used, to negatively affect the employee’s qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.” Signed into law without fanfare, as part of a larger economic development bill, this new provision has the potential to cause significant uncertainty, and, perhaps, unintended and troublesome consequences.

Even before the amendment, Massachusetts law required well maintained personnel records. Under M.G.L. c. 149, §52C, “Personnel Record” has been—and continues to be—defined broadly as a “record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee’s qualifications for employment, promotion, transfer, additional compensation or disciplinary action.” For employers employing 20 or more workers, those records must include, without limitation:

- name, address, date of birth, job title and description;
- rate of pay and any other compensation paid to the employee;
- starting date of employment;
- the job application of the employee;
- resumes or other forms of employment inquiry submitted to the employer;
- all employment performance evaluations, including but not limited to, employee evalu-

ation documents;

- written warnings of substandard performance;
- lists of probationary periods;
- waivers signed by the employee;
- copies of dated termination notices; and
- any other documents relating to disciplinary action regarding the employee.

The newly passed amendment, which is effective immediately, has added the requirement that employers provide notice to an employee whenever negative information is placed in the employee’s personnel record. Notice must be given within 10 days of “placing [the negative information] in the personnel record.” Thereafter, employees have the right to review or obtain a copy of the negative information.

In general, Massachusetts employers must provide an employee with a copy and/or the opportunity to review their personnel record within five business days of a written request. Under the amended law, however, the employee’s right to review his or her personnel record is limited to two separate occasions in a calendar year, except that any review occasioned by the employer’s notification that negative information has been placed in the employee’s file does not count against his or her right to two separate reviews per year.

The penalties for employer non-compliance with Personnel Record Law remain unchanged. Individuals cannot sue their employers for violations of this law, but the Attorney General, who is tasked with enforcing it, may seek fines ranging from \$500 to \$2500 for each violation.

The amendment to the Massachusetts Personnel Records Law is ambiguous. While it defines the term “personnel record” broadly, the statute’s reference to “placing” negative information “in the personnel record,” without so stating, seems to contemplate only the formal personnel file. Nonetheless, some commentators focus on the broad definition of “personnel record” set forth within the statute, and suggest that informal communications, such as e-mails and other casual communications may be part of a broadly defined “personnel record” and subject to the notification requirement if they contain information that may negatively impact the employee. If correct, this reading of the law would impose an impractical and substantial burden on employers across the Commonwealth, requiring notice to the employee whenever a supervisor documented for his or her own record something negative about an employee (or even retained such information received from any source), even though the document was not furnished to HR and not placed in the employee’s personnel file. Without further guidance from the Attorney General’s office or the courts, employers may decide to take the more practical approach of notifying an employee when negative information is placed in the employee’s personnel file. Either way, employers will still be left to exercise some judgment as to whether or not a given document has been or “may be used” to negatively affect the employee. On this point, it is probably best to err on the side of caution and provide notice to the employee.

Action Items for Employers in Massachusetts

- Sound HR principles have always supported transparency in sharing feedback with employees. Although these principles have not changed, transparency is more important now than ever before, so that an employee does not first learn of a problem by receiving the statutorily required notice that something negative has been placed in their personnel record.

- Massachusetts employers should immediately establish effective administrative protocols for alerting employees within 10 days whenever information that may negatively affect the employee’s employment is placed in the employee’s personnel file.

- Massachusetts employers should review their practices and procedures relating to what information and documents become part of the employee’s personnel record, eliminating the accumulation of unnecessary information that might unnecessarily trigger Massachusetts’ notice requirement but also ensuring that important documents that clearly may be relied upon for the purposes described in the statute (to the extent that can be determined at the time), and especially discipline, are included in the personnel record. For specific recommendations on how best to deal with the new law in your organization, or other issues relating to your human resources and employment practices, please contact one of the attorneys listed on this alert or any member of your Mintz Levin client service team.

Upcoming Programs

Employment Law Issues for Health Care Organizations

Monday, January 10, 2011 12:00 PM

Joan Ackerstein of Jackson Lewis will provide an update on employment issues arising in health care organizations. Specific matters to be discussed include standards applicable to claims under the healthcare whistleblower statute, M.G.L. c. 149, Section 187, and the applicability of the charitable immunity cap to those claims; the state of the privilege afforded to peer review communications; meal breaks and off clock work and the avoidance of class action claims; managing ADA/FMLA claims in the context of a physically demanding healthcare workplace; and conforming with the August, 2010, amendment to the personnel records statute.

Coming Out in the Workplace

Thursday, January 20, 2011 4:30 PM

Please join us for the first part of a two-part series about being out in the workplace. LGBTQ attorneys and law students must constantly consider whether to be out in the workplace, with whom to be out, and the possible consequences of being out. Each choice may result in different stressors. Coming out can lead to discrimination and hardship. Not being out can be equally daunting, as you may strain to talk about yourself without revealing partners, friends, or participation in LGBTQ-identified activities.

Past Programs

Changes to Personnel Records Statute

Tuesday, October 5, 2010 12:30 PM

The Massachusetts Personnel Records statute was recently amended to require employers to notify an employee within 10 days of any submission to a personnel record that reflects negatively on the employee. The amendment was part of a larger economic bill and was adopted with little fanfare. This change has caused uncertainty amongst both management side lawyers and plaintiffs' counsel. Speakers Martha Zackin, Mintz Levin, and Sharen Litwin, Kotin, Crabtree & Strong, LLP, will describe the potential impacts of the changes to the personnel record statute and provide practice pointers to counsel representing management and employees.

The US Supreme Court Quon Decision: What Employers Need to Know About its Impact on Employee Privacy Rights

Thursday, October 7, 2010 12:00 PM

Speaker Mark Whitney, Morgan, Brown & Joy, will focus on practical guidance for employers (both government and private), the importance of company technology policies, issues not addressed by the decision, and an update on employee privacy rights and emerging technologies.

Representation of Transgender Clients across Practice Areas

Thursday, October 7, 2010 12:30 PM

You are about to meet with a transgender client for the first time. Could you answer the following questions? What sorts of challenges has this person faced, and how will they shape the way you interact? What preconceptions might you be bringing with you, consciously or unconsciously? How will the client's gender identity or expression affect the case? Is his or her transgender status even relevant? If so, how is it relevant, and what questions should you ask? How do you decide?

Labor and Employment Kick-Off Reception

Tuesday, October 12, 2010 5:00 PM

Join the Labor and Employment Section as we kick-off the new membership year with a cocktail and hors d'oeuvres reception Tuesday, October 12 from 5-7 at the BBA. Meet and mingle with other L&E attorneys of the Boston area at this fun social. There will be a brief discussion of our exciting programming initiatives for the year. We look forward to seeing you there! Please RSVP.

It's Not Just Arizona: An Update on State and Local Immigration Initiatives Affecting Businesses Nationwide

Tuesday, October 19, 2010 12:00 PM

States and municipal governments are increasingly taking the initiative to regulate immigration at a local level. Despite the fact that immigration has historically been regulated at the federal level, many states and some local jurisdictions have created legislation aimed at targeting illegal immigration, in order to step in where they feel the federal government has failed to do so. These state regulations and local ordinances specifically target private corporations and impose severe penalties for the employment of undocumented workers (including temporary and permanent revocation of business licenses) and/or require corporations to participate in standardized employment verification programs (i.e. E-verify) in order to conduct business and/or work pursuant to certain contracts within their state.

37th Annual Robert Fuchs Labor Law Conference

Thursday, October 21, 2010 1:00 PM

In February 2010, the Senate confirmed Patricia Smith to be the Solicitor of Labor at the US Department of Labor. In June 2010, the Senate confirmed Mark Gaston Pearce and Brian Hayes to the National Labor Relations Board. Solicitor of Labor Smith and Board Member Pearce will be the keynote speakers at the conference. The Solicitor is the Secretary of Labor's principal legal officer, with responsibility for overseeing litigation conducted by the Department and for providing legal advice to the Secretary of Labor and other senior officials. The appointments to the Board bring the Board to five members for the first time in more than two years. With these appointments, Member Pearce and his colleagues are able to address lead cases that have been awaiting a full Board and respond to the Supreme Court's New Process Steel decision, which invalidated the two-member board decision. Both presentations will address topics of critical importance to practitioners, analyzing recent developments and framing future issues.

The second part of the program features a leading labor law scholar and three leading practitioners, who will be advancing their ideas on the opportunities for reform in terms of procedure and law presented by these critical presidential appointments and noting any concerns for the future. Moderated by Suffolk University Law School Professor Marc Greenbaum, these speakers are New York University Professor Samuel Estreicher, Greater Boston Legal Services Senior Attorney Monica Halas, General Counsel of the AFL-CIO Lynn Rhinehart, and Seyfarth Shaw Partner Jeremy Sherman. Solicitor of Labor Smith and Board Member Pearce will be pre-sent to comment on the suggested reforms.

CORI Reform: What the New Changes Mean for Your Clients

Wednesday, October 27, 2010 12:30 PM

Beginning in November, recent changes to the Criminal Record Information system will go into effect, changing the way employers in Massachusetts gather information from job applicants. In November, employers will no longer be permitted to ask potential hires about their criminal histories as part of an employment application. By May 2012, other significant changes will take effect, changing the scope and accessibility of the CORI system to both employers and companies that provide background check services.

Gregory I. Massing, general counsel for the Executive Office of Public Safety and Security, which administers the state's CORI system, and Dave Wilson, of Hirsch, Roberts & Weinstein, LLP will outline the recent legislative changes and help participants identify ways in which the new changes may impact their practice. There will be ample time for questions and answers.

Labor & Employment USERRA Training

Monday, November 1, 2010 6:30 PM

The BBA Labor & Employment Section has been presented with a unique opportunity to volunteer our services to the men and women who serve us in the U.S. Military. A "Yellow Ribbon Event" has been scheduled for December 19, 2010. Veterans and their families are invited to attend "Yellow Ribbon Events" and seek legal and other advice regarding the impact their military service has on their lives. The guidance of labor and employment lawyers is often sorely needed, especially post-deployment. The organizers of this event can offer us an opportunity to either advise returning soldiers directly, or address the group with general advice.

Labor & Employment Legislation Year in Review and What Is to Come

Tuesday, November 9, 2010 3:00 PM

Legislation often has a direct and immediate impact on employees and employers, including laws affecting

personnel records, non-competes, pensions, health insurance, Quinn Bill educational incentives, and CORI reform. Major legislation may require considerable effort by employers and unions to ensure proper implementation. Some legislation has resulted in legal action challenging conflicts with vested rights, conflicts with other laws, or violations of collective bargaining agreements. This seminar will explore major legislation from the last legislative session, its impact, and legal strategies to challenge legislation. This interactive seminar will also look forward to continuing impacts of legislative action, and what issues are coming up in the labor and employment arenas.

Social Media in the Workplace

Monday, November 15, 2010 12:30 PM

Social media are part of the entire employment relationship from pre-employment inquiries to monitoring and compliance post-employment. Employers and employees must fully consider the use and misuse of social media at each stage of the employment relationship. Panelists Erik Winton, Jackson Lewis, Keturah Martin, Jackson Lewis, and Ellen Messing, Rudavsky & Weliky, P.C., will discuss issues surrounding use of social media in the workplace from both the employer and employee perspective.

Non-Compete Q and A: Discussing the Proposal to Endorse House Bill 4607

Thursday, December 2, 2010 12:00 PM

The Public Policy Committee of the Business Law Section is drafting a proposal that the BBA endorse HB 4607, a bill that intends to codify and clarify Non-Compete laws in Massachusetts. In conjunction with the Labor and Employment Section, the committee invites all interested Boston Bar Association members to attend an informal Q and A session with the bill's drafters. This session is intended to allow members to address all questions and concerns about the bill before the committee drafts its final proposal. Speakers include Will Brownsberger, State Representative, 24th Middlesex County District, Lori Ehrlich, State Representative, 8th Essex County District, and Russel Beck, Beck Reed Riden.

CLE - Labor Arbitration Basics: What you need to know to effectively represent your client

Tuesday, December 7, 2010 4:00 PM

This seminar will focus on the "nuts and bolts" of labor arbitration. Attendees will learn how to manage client expectations in the arbitration process, how to propose or anticipate settlement offers at all stages of the process, how to prepare an opening statement, evidence and witnesses for the hearing, and what to expect at a hearing.

This panel of seasoned practitioners and arbitrators will provide practical tips for attorneys unfamiliar with arbitration as well as those attorneys interested in refreshing their perspective and gaining better understanding of the process. They will cover the role that arbitration plays in the union-management relationship as well as the roles advocates play in an arbitration, before, after and during the arbitration hearing.

When Worlds Collide: Litigating Employment Misclassification Cases Involving Business Franchisors and Franchisees

Friday, December 17, 2010 12:00 PM

A 2004 amendment to the definition of "employee" used in many Massachusetts statutes has generated several class actions. These suits pit the Commonwealth's wage and hour laws against franchise systems that treat franchisees as "independent contractors" relative to the franchisor who licenses the franchise. Speaker Michael D. Vhay, DLA Piper LLP, will examine the challenges presented in cases where the parties view their relationship through fundamentally different lenses. The program also will look at ways in which trial attorneys can help their business clients' perspectives prevail.

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