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SJC Affirms Employer's Liability for Discriminatory Manner in Which It Notified Employees of Layoff

The Massachusetts Supreme Judicial Court (SJC) recently affirmed a finding that an employer had discriminated against employees in the manner in which it notified them of their layoff, even though the layoff decisions themselves were not discriminatory.

Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Commission Against Discrimination arose from a layoff necessitated by budget cuts in the organization that administrates Boston's city hospitals (THH). In designing the layoff, THH decided that it would not provide advanced notice to affected employees and that it would monitor employees as they gathered their belongings and left the premises. THH laid off five African-American women. When supervisors informed those individuals of their layoff, they told the women that they were being terminated effective immediately and monitored them while they packed their belongings. The same supervisors gave a Caucasian male selected for layoff advanced notice of his termination, and did not monitor him while he packed his belongings.

The five African-American women filed charges of discrimination with the Massachusetts Commission Against Discrimination (MCAD), claiming that their supervisors' treatment of them in notifying them of the layoff

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District Court Finds Discrimination Claim Under MCAD Investigation ERISA-Preempted

The U.S. District Court for the District of Massachusetts recently found that the federal employee benefits statute known as the Employee Retirement Income Security Act (ERISA) preempts a state law charge of alleged reverse sexual orientation discrimination. The decision in *Partners Healthcare System, Inc. v. Sullivan* signals to Massachusetts employers that employees or former employees who challenge benefit plan designs as discriminatory under state anti-discrimination laws may find themselves limited to remedies under ERISA, with their claims decided by a judge (rather than a jury) applying a very deferential standard of review to a plan administrator's interpretation of benefit plan terms.

Massachusetts General Laws ch. 151B (Chapter 151B) bars discrimination in terms and conditions of employment, including benefits. In 2005, a Partners employee filed an MCAD charge, alleging that Partners had discriminated against him under Massachusetts law because it offered benefits under various employee welfare benefit plans to its employees' unmarried same-sex domestic partners, but not to its employees' unmarried heterosexual domestic partners. In late 2006, the MCAD amended the charge to include a claim of "associational sex discrimination" under Massachusetts law and Title VII. In response, Partners filed an action in District Court against the MCAD commissioners and

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constituted illegal discrimination. The MCAD found in the complainants' favor and awarded them emotional distress damages. THH successfully challenged the MCAD's finding in Massachusetts Superior Court, where the judge credited THH's defense that the supervisors treated the Caucasian male differently because he held a different type of position. THH had argued that its primary concern in implementing the layoff was maintaining the confidentiality of patient files, and the Caucasian male employee's job duties did not give him access to such files.

The Massachusetts Appeals Court reversed the Superior Court and reinstated the MCAD's award in a decision discussed in the March 2006 issue of the *Report*. The SJC then granted further appellate review and again affirmed the MCAD's finding that THH's conduct was discriminatory.

Noting that several of the complainants did not have access to confidential files, the SJC found that the employer's stated reason for its conduct – concerns regarding patient confidentiality – were not supported by the evidence. Further, the SJC observed that, in designing the layoff, the employer had made a uniform decision not to provide advanced notice to any employees and to monitor all terminated employees as they gathered their belongings. THH, however, did not apply this procedure consistently, and instead treated the Caucasian male employee less harshly. The Court held that this deviation from the planned layoff procedures was an adequate basis for the MCAD's finding that THH had engaged in prohibited discrimination.

This case demonstrates that the MCAD and courts may not limit their scrutiny of layoff decisions to the employer's criteria for selecting affected employees. Employers should ensure that layoffs and other adverse employment actions are not only designed in a non-discriminatory manner, but are also carried out in a way that treats employees equally regardless of their race, gender, or other protected characteristics.

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the complaining employee, requesting that the federal court enjoin the state court proceeding because ERISA preempted the state law claim.

Recognizing that Chapter 151B does not act "immediately and exclusively upon ERISA plans," or reference ERISA, and that an ERISA plan is not "essential to the law's operation," the Court found that ERISA conclusively preempted the MCAD claim on the ground that the Massachusetts statute has a "connection with" an ERISA plan. The Court reasoned that the law would virtually dictate the choice of beneficiaries to Partners' ERISA plans. In particular, the Court rejected the argument that the state statute would not dictate plan terms or adversely affect the national administration of Partners' ERISA plans because Partners could simply cease providing benefits to all domestic partners if the MCAD found its current plans discriminatory. The Court also rejected the argument that an express exemption in ERISA saves Chapter 151B from preemption as a state law of general applicability that bars discrimination on the basis of sexual orientation.

Finally, the Court rejected the argument that the state law discrimination charge should survive ERISA preemption because it sought investigation of "associational discrimination" under state and federal discrimination laws. The Court reasoned that the U.S. Supreme Court had previously refused to save state laws that afforded greater protection than Title VII from preemption under ERISA. The Court also declined to analogize associational discrimination based on sexual orientation relationships to interracial relationships.

Massachusetts employers should review with experienced ERISA litigation counsel any existing or potential claims challenging a benefit plan design as discriminatory under state law in order to properly preserve the defense of ERISA preemption. Successfully posturing such cases for ERISA preemption can limit judicial review and available remedies.

Employment Contract Negates Oral Representations Made During Negotiations

Many employees believe that oral representations made during employment contract negotiations by those authorized to speak on behalf of a company are enforceable contract terms even if they do not appear in the written employment agreement signed by the parties. In *Masingill v. EMC Corporation*, however, the SJC held that where an employee engages in arms-length negotiations and knowingly signs an employment contract that does not include terms requested by the employee during the negotiations, the employee cannot establish reasonable reliance – an essential element of a claim for misrepresentation.

During contract negotiations with Data General's CEO and senior vice president, Joanne Masingill expressed concern that Data General would be sold, as her previous company was, and requested financial protection. Masingill aggressively pushed for forward-vesting stock and other benefits to be included in her employment contract in the event that Data General was sold. The terms Masingill sought were not included in the contract Masingill ultimately signed. Eight months after Masingill started work, Data General was sold to EMC Corporation. Masingill eventually left EMC Corporation after attempts to find her a suitable position were fruitless.

Masingill sued for misrepresentation and claimed she was entitled to the forward-vesting stock and other benefits she had sought in her contract negotiations. Masingill's suit alleged misrepresentations by Data General and in particular the CEO and senior vice president. To prevail on this claim, Masingill had to prove that Data General knowingly made a false representation of material fact for the purpose of inducing her to act on the representation, and that her reliance on the representation was reasonable. Masingill based her claim on oral statements made by Data General's officers during negotiations, including promises to take care of her if Data General were sold, and to make her whole following a six-month review. Masingill argued that those statements amounted to an explicit promise to provide greater benefits than those outlined in the written contract. At trial, the jury found that Data General had knowingly and recklessly made false statements, and that Masingill's reliance on some but not all of the representations was reasonable.

On appeal, the SJC reversed, holding that the representations were both vague and ambiguous. The SJC explained that the alleged misrepresentations occurred during the course of "give-and-take" negotiations. After signing the contract, Masingill was aware that she did not receive the benefits she sought. In essence, the Court found that regardless of whether Data General made the alleged representations to her, as a matter of law, Masingill's reliance on those representations was not reasonable where her written contract contained none of the terms.

This decision highlights the importance of ensuring that employment contracts address all material terms. It is unlikely an employee will be able to prevail on a misrepresentation claim based on promises that are not part of the written agreement where the negotiations are memorialized in a written contract.

First Circuit Holds State Law Claims Preempted Under ERISA

Transferred back and forth between subsidiaries of Raytheon Company and then advised erroneously about the amount of his pension benefit, Emory Zipperer voluntarily took early retirement in reliance upon Raytheon's miscalculation of his annuity. Zipperer sued Raytheon in state court, asserting claims of negligence, equitable estoppel, and misrepresentation under Massachusetts law. Raytheon removed the case to federal court, and the District Court in *Zipperer v. Raytheon Company* dismissed his claim as preempted under ERISA.

The path to the erroneous calculation began years earlier. Hired at the Raytheon subsidiary United Engineers & Constructors (UEC) in November of 1972, Zipperer served as a field engineer until 1990 when he transferred to another subsidiary, Raytheon Services Nevada (RSN). The Raytheon Benefit Center, which administered the pension plans for both subsidiaries, adjusted his pension service date to reflect his previous UEC service, but transferred no trust funds from the UEC plan to the RSN plan along with the pension liability.

In 1993, one month after his work for RSN ended, Zipperer began employment with another subsidiary, Raytheon Engineers & Constructors (REC), a successor to UEC. The Raytheon Benefit Center, which also administered the REC pension plan, failed to transfer trust funds to the REC plan, but credited Zipperer for his original UEC service for a second time in yet another pension plan. Next, in 1995, when Bechtel Nevada replaced RSN as a Department of Energy contractor, the RSN pension trust funds were transferred to the Bechtel Nevada Employee Retirement Plan. As a result, both the Bechtel Plan and the REC plan included Zipperer's original UEC service in their respective pension calculations.

In late 1999, Zipperer requested an estimate of his pension benefit. Based upon REC's computation that he and his wife would receive a monthly benefit of $980.55 if he elected a joint and survivor annuity, Zipperer retired. However, Zipperer received $140 less per month. Then, in June 2001, the Raytheon Benefit Center informed Zipperer that he was entitled to a monthly benefit of only $400.06. Zipperer exhausted the plan's internal appeals and filed suit.

The U.S. Court of Appeals for the First Circuit concluded that ERISA preempted Zipperer's state law claims. Trying to avoid ERISA preemption, Zipperer argued that his claims related to Raytheon's independent legal obligation to keep proper records, that his claims did not supplement, duplicate, or supplant ERISA's enforcement mechanisms, and that he sought negligence damages, not reinstatement of the promised higher benefits. The First Circuit rejected his argument, finding that ERISA preempted his claims, all of which could "only be evaluated with respect to Raytheon's recordkeeping responsibilities for the plan" which the Court found "part and parcel of Raytheon's plan administration."

The Court also recognized that state laws that conflict with ERISA's objectives cannot survive preemption. The First Circuit found that Zipperer's claims would require an analysis of the ERISA plan at issue, to which his claims "were inseparably connected." The Court also voiced concern that Zipperer sought to "engraft" Massachusetts state law tort obligations onto ERISA, and that such state law claims, if allowed, would create the threat of conflicting and inconsistent state and local standards and detract from the national uniform administration of ERISA plans.

Appeals Court Limits Definition of "Service Charge" Under Old Tip Statute

During the last five years, almost thirty purported class action lawsuits have been brought against Massachusetts businesses arising from their practices in distributing tips and services charges collected from customers. Most of these cases have occurred in the hospitality industry and involve claims by service employees under Massachusetts General Laws ch. 149, § 152A (the Tip Statute), which governs the distributions of tips and service charges. On August 2, 2007, the Massachusetts Appeals Court issued the first appellate decision to consider the definition of "service charge" under the statute that was in effect prior to September 2004 (the old Tip Statute).

In *Cooney v. Compass Group Foodservice*, the Appeals Court held that if a business charges a fee that is called a "service charge" on a customer's invoice, at least under the old Tip Statute, the proceeds from that fee must be paid to wait staff employees as a tip. This is so, the Court said, regardless of whether the fee was intended to be a gratuity. As it existed prior to September 2004, the Tip Statute applied only to the distribution of tips and service charges to food and beverage servers. Effective September 2004, the statute was substantially rewritten. The "new Tip Statute" applies not only in the food and beverage industry, but also to service charges and tips in other businesses in which employees "customarily" receive tips or gratuities. Further, the new Tip Statute specifically defines the types of employees eligible to receive tips and service charges. The *Cooney* case, brought under the old Tip Statute, does not directly involve the new Tip Statute, but plaintiffs are likely to argue that it has a bearing on it.

The ten *Cooney* plaintiffs, servers employed by Chartwells at Northeastern University's Henderson House, sued their employer and the University, which had contracted with Chartwells to provide food and beverage services at the conference center. The plaintiffs claimed they were entitled to the service charges that Northeastern charged its Henderson House customers. Northeastern first included a 5 percent "service charge" on its invoices in 1994, but by 2001, the rate had increased to 18 percent. Northeastern intended this charge to be a "facilities fee" and used the proceeds exclusively for the upkeep of Henderson House. If asked, the University informed its customers that the charge was not a gratuity. Chartwells also paid the servers on a "non-tipped" wage scale, intended for employees who did not receive substantial gratuities.

Relying on the old Tip Statute then in effect, which provided that "if an employer or other person submits a bill or invoice indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them," the plaintiffs sought to recover the service charges. Northeastern argued that the term "service charge" as used in the old statute was ambiguous in the absence of a statutory definition of the term, and that liability should not be imposed on "invoicing-entities" that innocently misnamed a fee intended for a purpose other than a tip by calling it a "service charge."

The Appeals Court rejected the University's arguments, ruling that "where the language of the statute is clear, it is the function of the judiciary to apply it, not amend it." The Court found the statute clear and unambiguous as to the meaning of "service charge" and the requirement that all proceeds of any "service charge" be remitted to wait staff regardless of the University's intent.

The Appeals Court's ruling highlights the risks that businesses face when they misuse the term "service charge." While the decision could be read to suggest that under the old Tip Statute, any fee imposed by a food and beverage business that is called a "service charge" without further explanation of its purpose must be turned over to its food and beverage servers, businesses should be aware that employees are likely to argue that it has broader application beyond its narrow facts. For that reason, it behooves all businesses that impose charges that are not intended to be gratuities and employ individuals who customarily receive tips to review their policies, customer-related documents, and invoices. Any fee not intended to be and not actually paid to wait staff as a tip or gratuity should not be labeled as a "service charge" and should only be labeled as such for "service employees" with extreme caution.

First Circuit Affirms Individual Liability of Corporate Officers

In *Chao v. Hotel Oasis, Inc.*, the First Circuit confirmed that corporate officers may be held individually liable for a corporation's violations of the Fair Labor Standards Act (FLSA). This case arose out of a Department of Labor (DOL) investigation into Hotel Oasis's compliance with the FLSA's wage and hour requirements. The DOL prevailed in a lawsuit filed in the U.S. District Court for the District of Puerto Rico, alleging that Oasis violated the FLSA's minimum wage, overtime, and recordkeeping provisions. Among its rulings, the District Court held that Oasis's president was personally liable as an "employer" under the FLSA.

Oasis argued that the FLSA does not contemplate holding corporate officers individually liable for a corporation's violations of the statute. The First Circuit disagreed, explaining that under the FLSA an "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Based on this reasoning, there may be multiple "employers" simultaneously liable for a corporation's FLSA violations.

Citing an earlier First Circuit decision, the Court stated that "the overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." The Court, however, acknowledged that not every corporate employee who exercises supervisory control over employees should be held personally liable under the FLSA.

In reaching its decision, the Court highlighted several important factors to be considered in determining whether personal liability is appropriate: (1) whether the individual has an ownership interest in the company; (2) what degree of control the officer has over the company's financial affairs and compensation practices; and (3) what role the officer played in causing the company to compensate or not compensate employees in accordance with the FLSA. Applying these factors, the Court held that Oasis's president was personally liable. The president had ultimate control over the hotel's business. He was principally responsible for directing employment practices such as hiring, firing, holding mandatory meetings, and setting employee wages and schedules. "He was thus instrumental in 'causing' the corporation to violate the FLSA."

The *Hotel Oasis* decision is a sobering and cautionary reminder to corporate officers and management alike that the corporation cannot always provide a shield from personal liability for violation of employment and wage laws.

Warning to Employers – Be True to Your Words

The MCAD recently held that the City of Lawrence School Department engaged in age discriminated and retaliation when it failed to appoint Rose Flanagan, then fifty-five years old and a thirty-three year veteran at Lawrence High School, to a guidance counselor position on two occasions in 2003. The two individuals who were appointed were significantly younger than Flanagan. Each was fluent in Spanish, a requirement that the principal had for the position, but which was not memorialized in the job description or posting. The MCAD awarded Flanagan over $110,000 for lost wages and $40,000 for emotional distress damages.

Lawrence High School's student population is predominantly Hispanic, and over 20 percent of the students do not speak English. In 2000, the Guidance Department was reorganized, resulting in Flanagan, then a job placement counselor, being transferred out of the Department.

In October 2002, a position became available in the Department, and Flanagan was among the three finalists. All steering committee members except one rated Flanagan the top candidate. One member rated

Nancy Vega, then twenty-eight years old, higher than Flanagan because she was bilingual and had strong community ties in Lawrence. The principal, Thomas Sharkey, testified that his top requirements for the position were fluency in Spanish and involvement in the Lawrence community. The written job description for the position, however, listed as qualifications a master's degree and a minimum of two years' experience in the field. Vega was ultimately appointed to the position. Sharkey told Flanagan that she was not selected because he was looking for "energetic" and "flexible" people.

In August 2003, another vacancy occurred in the Department and a notice was posted. Again, the written job description did not specify a requirement or preference for a bilingual counselor. Flanagan applied for the open position, but was not selected for an interview. Sharkey testified that he said something to the effect of "We're not going to go through this again," when suggesting to the steering committee that they not interview Flanagan. Sharkey claimed to have made the statement because Flanagan reacted poorly when she received the news about Vega's appointment. Ultimately, Matt Baione, then thirty-one years old and fluent in Spanish, was appointed.

After a public hearing at the MCAD, the hearing officer found that Flanagan established that the School Department had discriminated against her on the basis of her age through both direct and circumstantial evidence, and that the School Department had retaliated against her for filing an MCAD complaint. Specifically, the hearing officer found direct evidence of age discrimination because the words "energetic" and "flexible" were *de facto* references to youth. She also found indirect evidence of age discrimination because Flanagan was fifty-five years old, had adequately performed her job, and had been twice passed over for guidance counselor positions in favor of individuals who were significantly younger. Although the School Department offered legitimate, non-discriminatory reasons for appointing Vega and Baione (the most important being fluency in Spanish) the hearing officer found the reasons were pretextual, because neither job description listed the ability to speak Spanish as a required or preferred qualification. Oddly, the job placement counselor position, under which Flanagan was hired previously, listed being bilingual (English/Spanish) as preferred.

With respect to retaliation, the hearing officer found Sharkey's statement, "We're not going to go through this again," most likely referred to Flanagan's protected activity – the filing of an MCAD complaint – and was therefore pretextual.

This decision highlights for employers the importance of ensuring that job descriptions accurately reflect the job being performed. Making selection decisions based on skills or qualifications that are not set out in the job description or job posting leaves the decision vulnerable to challenge.

Table of Cases

- *Chao v. Hotel Oasis, Inc.*, No. 06-1021, 2007 U.S. Dist. LEXIS 15354 (D. Mass. June 28, 2007).
- *Cooney v. Compass Group Foodservice*, 69 Mass. App. Ct. 632 (2007).
- *Flanagan v. City of Lawrence Sch. Dep't*, MCAD 03-BEM-02592 (July 13, 2007).
- *Masingill v. EMC Corp.*, 449 Mass. 532 (2007).
- *Partners Healthcare Sys., Inc. v. Sullivan*, No. 06-11436, 2007 U.S. Dist. LEXIS 56821 (D. Mass. July 31, 2007).
- *Trs. of Health & Hosps. of the City of Boston, Inc. v. Mass. Comm'n Against Discrimination*, 449 Mass. 675 (2007).
- *Zipperer v. Raytheon Co.*, No. 06-2493, 2007 U.S. Dist. LEXIS 16616 (D. Mass. July 12, 2007).

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