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Time-Barred Conduct May Be Sufficient Evidence in Retaliation Claim

Conduct that cannot be the basis of a lawsuit because it is time-barred may still be used as evidence in a claim arising out of non-time-barred conduct. In *Mole v. University of Massachusetts*, the Massachusetts Court of Appeals addressed the circumstances under which time-barred conduct may support a retaliation claim.

Mole began his employment at the University of Massachusetts Medical Center in the early 1980s and attained tenure and full professorship by 1987. Throughout the first decade of his employment, his department chair consistently reviewed Mole's performance positively. In 1990 and 1991, Mole's wife, a faculty member in the same department, filed sexual harassment complaints against the department chair with Mole's support. After the complaints and up until the Medical Center terminated his employment in 1999, Mole experienced a variety of adverse employment actions including reduction in teaching responsibilities, negative evaluations, a charge of scientific misconduct, and two significant cuts in his salary. Because he did not file a complaint of retaliation with the Massachusetts Commission Against Discrimination until May 1993, some, but not all, of this conduct was time-barred. Mole later removed his case to state court.

After hearing Mole's evidence, the trial court concluded that he failed to show a causal connection between his support of his wife's harassment claim and any adverse employment action against him, and entered a verdict in the defendants' favor. Mole appealed.

On appeal, the Court conceded that the causation issue was "complicated" by the fact that much of the alleged retaliatory conduct Mole experienced was time-barred, but emphasized that evidence of his earlier negative treatment supported his claim that the more recent conduct was retaliatory. The Court acknowledged that, to establish retaliation, Mole must show not only protected activity, the defendants' knowledge of it, and a subsequent adverse employment action, but also a causative connection between his activity and any adverse employment action. According to the Court, the causative link could be found based on the "character and intensity" of the defendants' actions, the proximity of those actions to their learning of Mole's protected activity, and the divergence of their views of Mole's performance before and after his protected activity.

Addressing the necessary connection between time-barred and non-time-barred conduct, the Court held that Mole could prevail

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Employee with ADHD and History of Outbursts Not "Disabled" Under ADA

In *Calef v. The Gillette Co.*, a former employee with a history of angry outbursts in the workplace claimed disability discrimination after being fired from his job. The United States Court of Appeals for the First Circuit concluded that Calef's learning disorder was not a disability and did not entitle him to the protections of the Americans with Disabilities Act.

Calef had a checkered employment history at Gillette marked by a series of outbursts and confrontations with his supervisors and co-workers. In 1995, he received a final warning after threatening to punch a coworker "in her face" if she asked him for assistance again. At that time, Calef began private counseling and was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Calef began taking Ritalin to control his ADHD, and reported a significant improvement in his ability to think clearly and to complete assigned tasks without becoming distracted. Both Calef and his therapist testified that Calef's ADHD, although affecting his response to workplace stress, was not the cause of his angry outbursts.

In December 1996, after separate interchanges with Calef about a scheduling dispute, his group leader and his group leader's supervisor found Calef to be barely coherent and possibly dangerous. The supervisor asked Calef to accompany him to Gillette's Medical Department. There, the nurses found Calef irrational and belligerent. As a result, Gillette sent him home, and later terminated his employment for unacceptable behavior and insubordination. Calef sued claiming disability discrimination.

The First Circuit, in assessing whether Calef was disabled, found that he did not have an impairment that substantially limited one or more major life activities. Although Calef claimed that he was substantially limited in the major life activities of learning and speaking, the Court found no evidence of either. Indeed, diagnostic tests and medical evaluations placed Calef within the "normal" range for both learning and speaking. Further, Calef himself testified that taking Ritalin controlled the ADHD symptoms. As to learning, the Court found it significant that Calef had demonstrated an ability to learn both before and after his ADHD diagnosis. With regard to speaking, the Court found that Calef interrupted others in conversation, a limitation in his ability to speak that the Court found was not substantial. The Court concluded that Calef, at most, had difficulty responding to stressful situations, which only occasionally resulted in incapacity. As such, Calef's condition did not rise to the level of a protected disability.

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if a jury could reasonably find the "unlawfully motivated time-barred acts had a sufficient effect on the acts within the limitations period." The Court rejected the defendant's argument that such a connection could not be found because different decision-makers, untainted by retaliatory animus, took the later adverse actions. Rather, the Court found that a jury could have concluded that the earlier retaliatory actions left Mole unable to change the circumstances that caused others to make adverse employment decisions, thereby rendering the defendants potentially liable.

Employers often argue successfully that an employee cannot recover damages for time-barred conduct. As this case reveals, however, employers may face greater difficulty in minimizing the impact of such conduct on the outcome of a non-time-barred claim. Under the Appeals Court's ruling in *Mole*, the existence of such conduct could serve as evidence to support the employee's claim.

Newspaper Carriers Found to be Independent Contractors

The Massachusetts Supreme Judicial Court recently offered additional guidance in applying the three-part test used to determine whether workers are independent contractors or employees for purposes of determining eligibility for unemployment benefits under the Massachusetts Employment and Training Law, G.L. c. 151A, §2. In *Athol Daily News v. Board of Review of the Division of Employment and Training*, the Court acknowledged that, to establish independent contractor status, the employer must prove that the worker (a) is in fact free from the employer's direction and control in performing the service; and (b) performs the service outside the usual course of the employer's business or its places of business; and (c) is engaged in an independent trade or business, wholly apart from the employer, providing services of the same nature as provided to the employer. The Court ruled, however, that the Division of Employment and Training (DET) erred when it decided that the employer, *Athol Daily News*, had failed to meet all three prongs of this "ABC" test.

The Court observed that the undisputed facts showed that the *Athol Daily News* intended its carriers to be independent contractors, and entered into a written agreement to that effect with each carrier. The agreement simply required the carrier to deliver the newspapers in good condition before a certain time each day. The Court ruled that the DET's finding that the carriers had decision-making responsibility over the "mode, manner and means of delivery" was sufficient to satisfy the first prong of the test.

The Court also held that the DET erred in its evaluation of the second prong of the test because it failed even to consider whether the carriers' work met the second criterion of the "either-or test"—the performance of "the service outside the usual course of the employer's business or its places of business." While the Court agreed that the carriers delivered newspapers in the usual course of the company's business, the Court observed that the carriers made deliveries to houses, bundle drops, stores and vending machines, none of which "could fairly be deemed [the company's] 'places of business.'"

Finally, as to the third prong, the Court rejected as "far too stringent" the DET's position that an individual must be able to "operate without a hindrance from any individual or force whatsoever." Specifically, the Court noted that "[b]y its very nature, the business of delivering newspapers is not limited to a single employer, and nothing with respect to the carriers' job performance in this case is unique to one certain newspaper publisher." The carriers used their own vehicles and were compensated for mileage. They were not paid an hourly wage, but purchased newspapers and resold them to subscribers at a price of their own choosing (theoretically, at least). The Court found compelling evidence that carriers are entrepreneurs, free to provide services to "anyone who wishes to contract with them, even competitors. . . ."

This decision highlights that the inquiry into whether an individual is an employee or an independent contractor is intensively fact-based, with the outcome depending on such factors as the nature of the work done by the individual, the type of business, and how and where the services are performed. Accordingly, employers and other businesses are advised to conduct an individualized analysis when considering whether an independent contractor designation is appropriate.

Employer's Rescission of Unvested Stock Options Can Be Lawful

A recent decision by the United States Court of Appeals for the First Circuit provides employers with guidance on how lawfully to rescind unvested stock options promised to an employee. In *Cochran v. Quest Software, Inc.*, the Court held that the employer's partial rescission of unvested stock options was a valid, consensual modification of the at-will employment agreement.

Brian Cochran accepted a position with Quest Software after receiving an offer letter that set out his compensation package, including a proposed grant of options for 60,000 shares of Quest stock "with the standard vesting schedule." At the commencement of his employment, Cochran signed an acknowledgment that he received and understood the employee handbook, and that he understood and agreed that his employment with Quest was not for a specified term, and could be terminated by either party, with or without reason, at any time. The handbook also contained numerous statements that all of Quest's employment relationships were at-will.

After about nine months of employment, Quest provided Cochran a vesting schedule, to which Cochran agreed in writing. Under the schedule, twenty percent of his options would vest on his one-year anniversary date, with the remaining vesting on various subsequent dates. All vesting was contingent on Cochran's continued employment.

Prior to his one-year anniversary date, Quest informed Cochran that it was reducing his total options because it was disappointed with his performance. Before any of the options vested, Cochran signed a form acknowledging this change. Cochran reached his one-year anniversary, and twenty percent of his options vested. Several months later, when Quest terminated his employment, Cochran's remaining options lapsed.

Cochran filed suit against Quest alleging that it unlawfully rescinded a portion of his options and wrongfully terminated his employment. At the outset, the Court emphasized that the parties had a contractual agreement for at-will employment, the terms of which were set forth in the offer letter and related documents and defined the parties' respective rights and obligations during the relationship. Further, because Quest's promise to grant Cochran stock options was one of the terms of the employment agreement, Quest could not unilaterally modify this term. Accordingly, the Court focused on whether the parties to the contract agreed to the modification and whether the modification was supported by consideration. The Court found that (1) Cochran consented to the modification by knowingly signing the acknowledgment memorializing the reduction in options, and (2) Quest's forbearance from ending Cochran's employment and his continued performance constituted the necessary mutual consideration. In light of those findings, the Court concluded that Quest's partial rescission of Cochran's unvested options was a valid, consensual modification of the employment agreement.

The Court also rejected Cochran's wrongful discharge claim because the express terms of his employment agreement established that either party could terminate the employment relationship at any time with or without cause. The Court further rejected Cochran's attempt to circumvent the at-will doctrine through a claim for breach of the covenant of good faith and fair dealing which applies if an employee can demonstrate that the employer

terminated his employment to deprive him of compensation fairly earned and legitimately expected for services already rendered. Cochran argued that Quest breached this implied covenant by terminating his employment to prevent the vesting of his remaining options. The Court rejected Cochran's underlying assumption that unvested stock options are deferred compensation for services already performed. Rather, applying Massachusetts law, the Court held that unvested options are not earned compensation for past services, but future compensation contingent on continued employment. Accordingly, the Court dismissed this claim.

Although this decision does not present groundbreaking legal precedent, it underscores an employer's right to reduce or rescind unvested stock options as long as the employee consents to this modification and receives sufficient consideration in return. Moreover, the case stresses the importance of having employees acknowledge their at-will status in writing and assent to any change in a stock option agreement in writing. This decision also reminds employers that, under Massachusetts law, an at-will employee's continued employment may constitute adequate consideration for a change in contract terms.

The Perils of PERM

The U.S. Department of Labor (DOL) will soon publish proposed regulations for a revolutionized labor certification program—the PERM program.

Labor certification is often the first step in the employment-based permanent residence (green card) sponsorship process. To obtain labor certification, an employer must establish that it has advertised for the proffered position and could not find willing and qualified U.S. workers. Presently, applications for labor certification are reviewed by both state and federal agencies: they are filed with the State Workforce Agency (SWA) in the location of employment, and ultimately adjudicated by the DOL. Although processing times vary by location, the average wait for approval exceeds two years, and the process is widely perceived as cumbersome.

As presently conceived, the PERM program seeks to streamline, and radically change, the system for processing labor certification applications. Applications for labor certification would be submitted electronically to the regional DOL office, which would screen them via an automated system. The case would either be approved by the automated system, or selected for audit. Upon completion of audit, the DOL would either approve or deny the application, or order additional, supervised recruitment.

The PERM program would replace the existing labor certification process. Applications pending when the PERM program is enacted would be processed according to the previous regulations unless the employer chose to convert pending applications to the PERM program.

One of the most significant changes contemplated by this program is in the recruitment requirements. The employer would have to publish two advertisements in the Sunday edition of a local newspaper, or one Sunday newspaper advertisement and one advertisement in a trade journal. The advertisement would require far more detail than presently required, including the employer's name and proffered salary. Employers would also have to place an online job order with the SWA. Finally, employers would have to demonstrate that they used any three of the following methods of recruitment: (a) job fairs, (b) on-campus recruitment, (c) private recruitment agencies, (d) advertisement on job search websites and/or employer's external website, and (e) recruitment from professional and/or trade organizations.

Unlike the existing process, the proposed rules would permit employers to list job requirements only in terms of the experience, education and training needed to perform the job. PERM would severely restrict the employer's ability to list additional skills as a requirement for the position.

PERM would also eliminate current regulations permitting employers to require and accept experience gained in related job positions. Moreover, employers would no longer be able to count experience gained on the job, even if it is in a completely different position and even if it is with a predecessor, successor or affiliate of the employer.

The DOL anticipates issuing proposed regulations in September 2003, on which it will solicit public comments. Implementation is anticipated in early 2004.

Amendments to the Massachusetts Minimum Wage Act Regulations Bring the State's "White Collar" Exemptions in Line With Federal Law

Amendments to the Massachusetts Minimum Wage Act Regulations, which became effective on April 25, 2003, bring several key areas of state wage and hour law in line with analogous federal laws. Notably, changes to the subsections governing basic minimum wage and overtime rates make clear that the "executive, administrative, and professional" exemptions (the so-called "white collar" exemptions) are to be defined under Massachusetts law in a manner consistent with the analogous exemptions under the federal Fair Labor Standard Act's regulations. While Massachusetts courts have generally interpreted the exemptions in a manner consistent with federal law, the new regulations codify this requirement. Accordingly, if and when the United States Department of Labor issues its anticipated new regulations on this topic, Massachusetts' white collar exemptions will be interpreted consistently with them.

Upcoming Breakfast / Telephone Briefings

Seyfarth Shaw's Labor and Employment Practice Group conducts monthly breakfast and telephone briefings designed to inform our clients and other interested employers about developments in this area of the law. Upcoming Breakfast/Telephone Briefings include:

June 24	"Low Risk" Selection Assessment
July 17:	Protecting Trade Secrets and Enforcing Restrictive Covenants
September 10:	Update on Immigration Law for Employers

In addition, Seyfarth Shaw will be presenting its bi-annual Labor & Employment Law Symposium on October 10, 2003 at the Babson Center for Executive Education in Wellesley, MA. Further information for registering early for this program will be sent to you shortly.

To receive email notification of these briefings, please email Denise Welding at dwelding@seyfarth.com.

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Although this analysis disposed of the case, the Court went on to consider whether Calef (if disabled) was a "qualified" individual with a disability. To be deemed qualified, an employee must be able to perform the essential functions of a position, with or without an accommodation. Relying on evidence that Gillette had terminated other employees for behavior similar to Calef's, the Court concluded that handling stressful situations was an essential function of Calef's job.

In sum, *Calef* will serve as an additional guidepost for employers applying disciplinary measures to disabled employees. Most importantly, an employer need not accept threatening behavior, even if the employee claims that his misconduct results from his disability. However, employers should proceed cautiously with any claimed disability because a variety of factors should be considered before concluding that an employee is, or is not, protected by the ADA. Further, this decision only analyzes the plaintiff's claim under the ADA. The impact of this holding on Massachusetts courts interpreting disability discrimination claims under the Massachusetts Fair Employment Act, G.L. c. 151B, is not completely certain.

Table of Cases

Athol Daily News v. Board of Review of the Division of Employment and Training, 439 Mass. 171 (Apr. 15, 2003)

Calef v. The Gillette Co., 322 F.3d 75 (1st Cir., Mar. 11, 2003)

Cochran v. Quest Software, Inc., 328 F.3d 1 (1st Cir., Apr. 29, 2003)

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