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Manner in Which Employees Are Notified of Layoff Found Discriminatory

The Massachusetts Appeals Court recently held that an employer may be liable for emotional distress damages for discriminating against employees in the manner in which it notified them of their layoff, even if the selection for layoff was not discriminatory.

Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Comm'n Against Discrimination arose from a layoff necessitated by funding cutbacks in which the organization that administrates Boston's city hospitals ("THH") terminated six employees — five African-American women and a Caucasian man. The complainants did not challenge the criteria THH used to select employees for layoff, but rather the manner in which THH's supervisors informed them of their layoffs.

When THH's program director and director of labor relations informed the first two complainants of their layoff, they told the women that they were being terminated effective immediately and directed them to collect their belongings and leave within thirty minutes. The directors then monitored the women while they packed their belongings. The women were then ushered out of the building without being allowed to say goodbye to their co-workers.

The directors notified the Caucasian male selected for layoff in a much different fashion. They gave him a month's advance notice and allowed him to come into the office at his convenience to collect necessary paperwork. The directors did not monitor him while he packed his belongings and allowed him to walk around the office to bid his co-workers farewell.

The complainants filed charges of discrimination with the Massachusetts Commission Against Discrimination ("MCAD"), claiming that the directors' treatment of them constituted illegal discrimination. An MCAD hearing officer found in their favor and awarded each complainant emotional distress damages of between $20,000 - $25,000.

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Frivolous Non-Compete Lawsuit May Be Unfair and Deceptive Business Act

In *Brooks Automation, Inc. v. Blueshift Technologies, Inc.*, the Massachusetts Superior Court recently found that a company willfully violated Massachusetts General Laws c. 93A ("Chapter 93A") — the state unfair trade practices statute — by filing a frivolous lawsuit against a former employee and the company he founded in order to interfere with their efforts to develop a contractual relationship with a coveted customer. The Court also held that a non-compete agreement does not bar a former employee from preparing to compete with his former employer during the non-compete period, absent specific language in the agreement prohibiting the employee from doing so.

Peter van der Meulen and his former employer, Brooks Automation, executed a separation agreement, which prohibited him from competing with Brooks for one year. A separate non-disclosure agreement between the parties barred van der Meulen from disclosing Brooks's trade secrets and confidential information. During the one-year non-compete period, van der Meulen incorporated a new company, Blueshift Technologies. Blueshift attempted to sell its semiconductor wafer manufacturing technology to Applied Materials, a prospective customer with which Brooks had been negotiating to sell the same technology. When Brooks learned that Applied Materials was negotiating with Blueshift, Brooks filed suit against Blueshift and van der Meulen, alleging that van der Meulen had violated the non-compete provision and had stolen trade secrets.

Blueshift filed a counterclaim against Brooks, alleging that in filing the lawsuit and informing Applied Materials of it by e-mail before serving it on or notifying Blueshift and van der Meulen, Brooks (i) committed an unfair or deceptive act or practice in trade or commerce in violation of Chapter 93A and (ii) tortiously interfered with Blueshift's contractual relationship with Applied Materials.

A jury found for Blueshift on its counterclaim for interference with contractual relations and awarded $209,300 in damages, which reflected the purchase order

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After losing an administrative appeal at the MCAD, THH challenged the MCAD's finding in Superior Court. The Superior Court judge ruled in THH's favor, crediting its defense that the directors treated the Caucasian employee differently because he held a different type of position.

The Appeals Court reversed the Superior Court and reinstated the MCAD's award. The Court held that the complainants were not required to show that THH treated them more harshly than it did any specific individual, relying instead on THH's admission that it had not treated any other employee terminated for budgetary reasons in a manner similar to the way it treated the complainants.

This case demonstrates that judicial scrutiny of employer conduct may not be limited to employment actions such as hiring, promotion, and termination. Employers must endeavor to treat employees fairly in all respects, including seemingly mundane details such as the manner in which they inform employees of their terminations.

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that Applied Materials failed to pay as a result of the lawsuit. Blueshift moved that the Court find that Brooks likewise violated Chapter 93A.

The Court found that Brooks, motivated by the desire to interfere with Blueshift's developing a contractual relationship with Applied Materials, filed suit when it sensed the possibility of a trade secret theft, without reasonably investigating whether an actual theft occurred. The Court further found that van der Meulen did not violate the non-compete agreement by taking steps during the non-compete period to prepare to compete with Brooks because the agreement did not contain specific language barring him from preparing to compete. Consequently, the Court determined that Brooks willfully violated Chapter 93A because it filed the action with reckless disregard for whether there was any reasonable factual support or arguable legal basis for its allegations.

The Court trebled the damages — as permitted by Chapter 93A for a willful violation — because Brooks succeeded in freezing Blueshift's relationship with Applied Materials and to send a strong message to Brooks and other companies that seek to misuse the right to sue in order to interfere with a competitor's efforts to develop a contractual relationship with a coveted customer.

This case delivers a powerful warning to employers to investigate fully any suspected violations of a non-compete or non-disclosure agreement before filing suit. This decision also serves as a lesson that if an employer wants to prohibit a former employee from preparing to compete during a period of non-competition, the written agreement should explicitly provide such a restriction.

Employer's Ongoing Retaliatory Conduct May Constitute a Continuing Violation

Harassing conduct that occurs outside the statute of limitations period may nonetheless be actionable when it is part of an ongoing pattern of conduct and at least some conduct occurred within the statutory period. In *Clifton v. Massachusetts Bay Transp. Auth.*, the Massachusetts Supreme Judicial Court ("SJC") considered whether a pattern of retaliatory conduct could likewise constitute a continuing violation. In doing so, the SJC formally adopted the holding of the U.S. Court of Appeals for the First Circuit ("First Circuit"), finding that retaliation may be based not simply on a "discrete and identifiable" adverse employment action, but on a pattern of behavior that is sufficiently severe or pervasive to create a hostile work environment.

After becoming the first African-American foreman at the Massachusetts Bay Transportation Authority's ("MBTA") Charlestown yard in 1986, Hiram Clifton experienced a pattern of ongoing discrimination. In the late 1980s, he complained of the conduct to his immediate supervisors, and in early 1990, he brought his complaints to the MBTA's equal employment opportunity office, but the conduct continued. On April 20, 1993, he filed his first charge of discrimination with the MCAD, alleging race discrimination, and on February 22, 1994, he filed a second charge asserting claims for race discrimination and retaliation. He later filed an action in Superior Court to pursue his claims. At trial, the judge instructed the jury that they could find for Clifton on his retaliation claim if the jury found that the MBTA had taken an adverse employment action against Clifton between April 20, 1993, when he filed his first charge, and February 22, 1994, when he filed the second charge. The jury found in Clifton's favor on both claims, awarding him $500,000 in compensatory damages and $5 million in punitive damages.

On appeal, the SJC found no basis for excluding a retaliation claim from the continuing violation doctrine. The Court recognized that even though retaliation typically involves a discrete act (such as termination or demotion), it may consist "of a continuing pattern of behavior that is, by its insidious nature, linked to the very acts that make up a claim of hostile work environment." Accordingly, the Court held that the trial court judge properly instructed the jury that it could apply the

continuing violation doctrine and award the plaintiff damages for retaliatory acts committed more than six months before he filed his charge of retaliation in February 1994. The Court also noted that it was not necessary for Clifton to have filed the second charge, provided the retaliation claim related to the earlier charge.

The SJC's holding brings Massachusetts law in line with the increasing number of jurisdictions that have found that a hostile work environment may constitute an adverse action for purposes of a retaliation claim. In addition, it clarifies that just as the continuing violation doctrine may apply to a discrimination claim based on a hostile work environment, so may it apply to a retaliation claim based on a hostile environment.

First Circuit Rejects Foreign Application of SOX Whistleblower Claims

In a case of first impression, the First Circuit held that the whistleblower protection provisions in § 806 of the Sarbanes-Oxley Act of 2002 ("SOX") did not apply extraterritorially. In *Carnero v. Boston Scientific Corp*., an employee working for foreign subsidiaries of Massachusetts-based Boston Scientific Corporation ("BSC") sued both subsidiaries for alleged retaliation in violation of SOX. The Court held that the employee, who was fired after complaining internally about inflated sales reports by Latin American BSC subsidiaries, could not claim relief under § 806, given Congress's failure to express a clear legislative intent to reach beyond U.S. borders.

The plaintiff, Ruben Carnero, worked for BSC's Brazilian and Argentinean subsidiaries. Although he performed his job duties mainly outside of the U.S., Carnero traveled to Massachusetts frequently and maintained regular contact with American supervisors. Carnero claimed that one subsidiary fired him in 2002 and the other in 2003, in retaliation for reporting to his BSC supervisors that some foreign subsidiaries of BSC engaged in accounting misconduct by improperly inflating sales figures. He filed a claim with the U.S. Department of Labor ("DOL") pursuant to § 806 of SOX, and later filed an action in the U.S. District Court. Both the DOL and District Court, however, dismissed his claims, holding that Carnero could not sue BSC under the whistleblower protection provision because it does not apply outside of the U.S.

In affirming the District Court's ruling, the First Circuit noted the "high and . . . insurmountable hurdle in the well-established presumption against the extraterritorial application of Congressional statutes." That presumption can be overcome only if there is an "affirmative intention of the Congress clearly expressed." Although Congress intended SOX to protect investors and build confidence in U.S. securities markets, which weighs in favor of broad application of the statute, the First Circuit found numerous other signals that Congress did not intend it to apply abroad. Section 806 itself is silent as to possible foreign application and nothing in the legislative history suggested that Congress intended it to have extraterritorial effect. In the absence of a clearly-expressed Congressional intent, the Court refused to extend application of the statute to employees working outside of the U.S. for foreign subsidiaries.

Handbook with Disclaimer May Be Basis for Contract Claim

Employers often wisely incorporate disclaimers in their employee handbooks. Some directly state that the handbook does not create contractual rights; others reserve to the company a unilateral right to amend, modify, or cancel the handbook's provisions. These clauses generally are designed to prevent employees from believing, or attempting to prove, that the handbook constitutes a contract or otherwise binds the company. In *Ortega v. Wakefield*, a Superior Court judge recently denied an employer's request to dismiss a breach of contract claim based on the company's handbook, notwithstanding the contract disclaimer it contained. The Court reasoned that the employee could reasonably have believed that management was bound by the progressive discipline procedures set forth in the handbook, which it did not follow.

Ortega, an at-will employee, worked at Wakefield for over twenty-two years without performance issues. A year before his termination, Ortega received a new copy of the employee handbook which outlined detailed policies and practices, including a description of Wakefield's progressive discipline policy. The handbook explicitly stated that the policies were neither "terms and conditions" of employment nor contractual terms. Ortega signed an acknowledgment that he had received, read, and understood the handbook's provisions. Thereafter, Ortega was several days late returning to work following a vacation. He claimed the delay was caused by flight complications, but Wakefield determined that Ortega's explanation was not credible. Wakefield summarily terminated him for dishonesty without pursuing any progressive discipline.

Wakefield's handbook stated that prior to termination, employees "generally" would receive "advance notice" of performance problems and an opportunity to cure them. The policy also outlined progressive discipline steps: verbal warning, written warning, three-day suspension, and termination. The handbook did not specify when Wakefield might deviate from those procedures.

The Court found that, as drafted, Wakefield's handbook attempted to reserve to the company the right to ignore any policy and withhold any rights the company offered in the handbook, with or without cause or notice. The Court emphasized that employers may not make explicit representations about job security (*i.e.*, through a progressive discipline policy) but at the same time reserve the right to avoid those provisions — thereby withdrawing the promised security — merely by including a boilerplate disclaimer. The Court held that a jury might find that the handbook was deceptively written because it informed the employee that he or she had certain rights, but permitted the company to choose when to grant them. The Court also noted that Ortega might persuade a jury that he had relied on the handbook as a condition of his continuing employment with Wakefield, and that his acknowledgment of the company's general policies, and his own privileges and obligations, could evidence an implied contract.

The *Ortega* decision reminds employers of the importance of drafting and applying handbook policies carefully. When an employer outlines policies in writing, it should expect to adhere to them. This is particularly true when it fails to identify specific, predictable instances when it might not apply them.

Parties Amend Employment Contract Through E-mail Exchange and Course of Conduct

A Massachusetts Superior Court recently rejected a former executive's claim that his employer breached its written contract with him by reducing his salary. In *Tomer v. Hollister Associates, Inc.*, the plaintiff, a senior-level director at a temporary and permanent placement firm, executed an employment agreement with Hollister in December 2000. The parties set Tomer's annual salary at $400,000 and provided that their written agreement could only be modified through a subsequent written agreement executed by the parties. In June 2001, following a downturn in business, Tomer initiated an e-mail exchange with Hollister's president regarding the need to reduce expenses. Specifically, Tomer and Hollister's president discussed lowering the salaries of several employees, including the plaintiff's, to keep the business "alive." During the e-mail exchange, Tomer noted that the reductions were regrettable, but acknowledged that they were necessary for the survival of the business. When business did not improve, Hollister's president further reduced Tomer's salary in September 2001 and then again in April of the following year. Although Tomer was unhappy with the subsequent reductions in his salary, he continued working at Hollister following each reduction. Tomer resigned in June 2004. At the time, his salary was $75,000. Tomer subsequently filed a lawsuit claiming, in part, that Hollister had breached his employment agreement when it reduced his salary without a written agreement between the parties.

In dismissing Tomer's breach of contract claim, the Court rejected his efforts to apply the strict contractual language regarding amendments. Instead, the Court found that mutual agreement after modification of an agreement may be inferred from the conduct of the parties. Here, Tomer worked for three years after Hollister initially lowered his salary, and he even had a lengthy e-mail discussion with Hollister's president regarding the necessity of the salary reductions before his salary was reduced the first time. By continuing to work after each reduction, Tomer accepted the terms of the new agreement with Hollister and was therefore not entitled to recovery for any reduction in salary. In short, a course of conduct between parties may modify a contractual agreement, even where the contract provides that any amendments must be made in writing.

USERRA Regulations Clarify Escalator Principle and Employer Posting Obligation

On January 18, 2006, the DOL's final regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") became effective for all employers. These regulations are the first comprehensive guidelines describing an employer's obligation to provide certain employment and reemployment rights to military service members. Below are some key provisions the regulations address:

- **Individual liability for supervisors.** Similar to Massachusetts anti-discrimination laws, the regulations impose liability upon individual supervisors and managers in appropriate cases.

- **Special rules for joint employers.** Where two entities exercise control over the terms and conditions of an individual's employment (*e.g.*, contract employees), both entities may be considered employers for purposes of USERRA and both employers must comply with the statute.
- **Health care continuation.** Similar to an employee's rights under the federal law known as COBRA, an employee on a military leave for more than thirty days may elect to continue employer-sponsored health coverage for up to twenty-four months, paying up to 102 percent of the full premium. For leaves less than thirty days, the employer must provide health care coverage as if the individual were still working. The employer may cancel health coverage if the employee does not elect coverage, but must establish "reasonable rules" for canceling and reinstating coverage where the employee elects coverage but fails to pay for the continued coverage.
- **Guidance on comparable leaves.** USERRA requires an employer to provide employees on military leave with the same non-seniority benefits and rights it would provide to non-service employees on leave. Prior to the new regulations, the DOL provided no guidance as to what leaves must be considered comparable to military leave and how an employer should compare the benefits offered on each type of leave. The regulations clarify that when comparing non-military and military leaves, the employer should consider the length of the non-military leave, the purpose of such leave, and the ability of the employee to choose when to take the leave.
- **Vacation time.** The regulations clarify that vacation leave is a non-seniority benefit and an employer need only provide employees on military leave with the same vacation leave benefits that it offers to other employees on leave.
- **Use of accrued leave.** An employer cannot require employees to take accrued paid leave while on military leave.
- **Reemployment.** Under USERRA, a returning employee has up to ninety days after returning from service to seek reemployment depending on the length of the leave. The returning employee may "try" out other jobs before seeking reemployment as long as the employee does not violate his or her obligations under company policies (*e.g.*, non-compete obligations).
- **Guidance on the escalator principle.** Under the escalator principle, an employer must return an employee to a position he or she would reasonably have had if he or she had not served in the military (including for purposes of promotion and salary increases). The regulations provide guidance on the length of time an employee has to "make up" required exams and when an increase in pay is appropriate. To determine what kind of pay increase is appropriate, the employer should look at the reasonable certainty that the employee would have qualified for an increase, his or her history of receiving increases, and other employees who remained in the position.
- **Statute of limitations.** There is no set time line for when a USERRA claim must be brought.

Finally, the new regulations reiterate an employer's obligation to post an employee's statement of rights. Employers may obtain a copy of a sample posting at www.dol.gov/vets/programs/userra/USERRA_Private.pdf.

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