

# Massachusetts Employment & Labor Law Report

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## District Court Decision Could Lead to Treble Damages for Overtime Violations Outside Massachusetts

In *Gonyou v. Tri-Wire Engineering Solutions, Inc.*, the U.S. District Court for the District of Massachusetts denied a Massachusetts-based employer's motion to dismiss on jurisdictional grounds a claim brought under the Massachusetts overtime pay statute. In doing so, the Court allowed for the possibility that Massachusetts wage and hour laws, which now include mandatory treble damages, may apply to individuals working for Massachusetts employers at facilities outside of the Commonwealth.

Tri-Wire Engineering Solutions, a company incorporated and headquartered in Massachusetts, hired Massachusetts resident James Gonyou as a technician. In January 2009, Gonyou became a "technician supervisor" and Tri-Wire transferred him to its Danbury, Connecticut, facility. In this new role, Gonyou alleged that Tri-Wire expected him to work at least fifty hours per week and docked his pay if he failed to do so. By July 2009, Gonyou claimed he had accrued 350 overtime hours for which he had not been paid time-and-a-half. He and several other employees "spoke out" about seeking legal recourse to recover these wages. Gonyou contended that once Tri-Wire became aware of these discussions, the company transferred him to its Worcester, Massachusetts, facility and demoted him. He was later terminated for unrelated reasons and subsequently filed suit in Massachusetts federal court for overtime wage violations under Massachusetts General Laws ch. 151, § 1A.

Tri-Wire moved to dismiss Gonyou's overtime claim because Gonyou sought to recover compensation for time worked in Connecticut. In support of its motion, Tri-Wire argued that state statutes are presumed not to apply outside of the state's borders and that the place of an individual's employment is the critical factor when deciding which state's law controls. Gonyou asserted that the Massachusetts overtime statute does not include any geographic limitation and that the "statute defines its reach by reference to the location of the employer, not the site of the work performed."

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See "Overtime Violations," page 2

## Employee's Request for Four-Hour Workday Is Not Reasonable Accommodation

The Massachusetts Appeals Court recently held that an employee was not a qualified handicapped person under Massachusetts General Laws ch. 151B (Chapter 151B) because her medical restriction to a four-hour work day made her incapable of performing the essential functions of her position, with or without a reasonable accommodation.

In *Tompson v. Department of Mental Health*, Judith Tompson, a mental health supervisor, was diagnosed with Crohn's disease and took a medical leave after an emergency surgery. Upon returning to work, she presented a note from her physician that set an "absolute limitation," restricting her to work no more than four hours per day. Her employer, the Department of Mental Health (DMH), notified her that she could not remain in her position on that basis because the job required a full-time schedule. The DMH offered her a transfer to several part-time positions, but she rejected each of them. After Tompson returned to her prior position and simply left work early everyday without approval, the DMH terminated her employment for failure to perform her essential job responsibilities.

Tompson filed a charge with the Massachusetts Commission Against Discrimination (MCAD), alleging that in discharging her, the DMH had engaged in handicap discrimination in violation of Chapter 151B. The MCAD dismissed the charge, and Tompson filed suit in Superior Court, asserting the same violations.

Affirming the Superior Court's summary judgment award in favor of the DMH, the Appeals Court denied Tompson's claims and held that she was not qualified for her position at the time of her discharge. Since it was undisputed that Tompson had a handicap, and that her handicap was the basis of her discharge, the Court focused directly on the issue of whether she was a "qualified" handicapped person and could perform the essential functions of her position with or without accommodation. Tompson argued that she could perform her job without needing any accommodation because supervising an eight-hour shift was not an

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See "Four-Hour Workday," page 2

*"Overtime Violations," cont'd from page 1*

In denying Tri-Wire's motion to dismiss, the Court found that the statute applies to "a Massachusetts corporation that operates in the Commonwealth and elsewhere, such as Tri-Wire." It declined to apply cases that Tri-Wire had cited because the cases involved statutes that were not identical to the Massachusetts statute and concerned plaintiffs who were not only working outside of the state at issue, but were also generally not residents of that state. The Court also found no indication that Massachusetts has a policy against applying its statutes to situations such as the instant matter.

The Court noted that it had "strictly limited [its ruling] to the facts and circumstances of this case and this motion." For example, this decision does not examine whether the Massachusetts overtime statute might apply to an employee living and working in Connecticut for a Massachusetts-based company. It also does not address the legal ramifications for a Massachusetts-based company that is incorporated in, for example, Delaware, which employs individuals in other states. However, the possibility of courts applying Massachusetts's comparatively strict wage and hour laws outside the borders of the Commonwealth under any circumstances provides further reason for vigilance on the part of employers incorporated or doing business in Massachusetts.

*"Four-Hour Workday," cont'd from page 1*

essential requirement of her job. The Court rejected that argument, noting that there was no evidence that the DMH allowed four-hour shifts for other employees in her position or for anyone performing similar duties.

The Court next examined whether Tompson could perform the essential functions of her job with a reasonable accommodation in the form of a four-hour day. It rejected this proposed accommodation since it would mean that half of Tompson's shift would have no supervision and someone else would need to perform Tompson's assigned tasks for that half of the shift. The Court concluded that the requirement to provide a reasonable accommodation does not require an employer to fundamentally restructure a job or to reallocate essential responsibilities to others, particularly on an open-ended basis.

This decision elucidates the analysis courts use to determine whether an employee can perform the essential functions of his or her job with or without an accommodation and reinforces the principle that employers need not make accommodations that require a restructuring of their operations.

## Court Allows Discrimination Claims To Survive Based on "Thin" Evidence

In a recent decision, the District Court held that "thin" evidence, including a single comment and a stuffed toy gorilla, may be sufficient for race discrimination and retaliation claims to survive summary judgment.

The plaintiff in this case, who is African-American, began working for the defendant company in 1981. In August 2005, he posted for one of two open supervisory positions. Earlier that year, the employee had applied for an identical supervisory position at a different facility, but a Caucasian employee, who had the highest interview score, received the position. Of the ten candidates for the newly posted positions, five received interviews, but this employee was not one of them. After the company promoted two of the final five Caucasian candidates, the employee filed an internal complaint of race discrimination concerning the decision not to interview him. Two of the company's HR representatives investigated the complaint. According to the employee, one of the HR representatives participated in the earlier decision not to promote him, thus creating a conflict of interest, and the other HR representative made the following statement to him during the investigation: "Every time black people don't get the position that they think they deserve, the first thing they cry is discrimination." The investigation resulted in a finding of no discrimination.

In his lawsuit, the employee claimed that following the investigation, the company retaliated against him by, among other things, subjecting him to a hostile work environment. As evidence he described discovering a stuffed toy gorilla in the locker room with a ribbon on it that said "party animal." According to one African-American co-worker, a Caucasian employee placed the stuffed animal in the locker room as a joke about another Caucasian employee who had a reputation for partying.

The Court granted the company's motion for summary judgment on the plaintiff's failure to promote claim, finding that the company showed that it hired a more qualified candidate for each open position and that the plaintiff failed to provide evidence to establish pretext. However, the Court allowed the plaintiff's discriminatory investigation and retaliation claims to survive. The Court found that he had met his burden to show pretext with "very thin" evidence, namely that one of the HR representatives had a conflict of interest because he participated in the earlier decision not to promote him, and because of the other HR representative's alleged statement about unsuccessful African-American applicants.

On the retaliation claim, the Court found that although "the issue is hardly free from doubt," a jury could find that the stuffed animal incident was severe and pervasive enough to create a hostile environment. It noted that "[t]he incident described was a single incident, and thus not frequent. Nor was it physically threatening. It was, however, potentially objectively humiliating and much more than a 'mere offensive utterance.'"

This decision provides an important reminder to employers that courts are reluctant to grant summary judgment in employment discrimination cases, and often allow them to proceed to trial based on “thin” evidence. It is therefore critical for employers to investigate all complaints of discrimination thoroughly and endeavor to ensure that the results of their investigations can withstand scrutiny in a court of law.

## Circuit Provides Guidance on Employer Liability for Supervisor’s Sexual Harassment Under Federal Law

Under federal law, an employer may avoid liability for a supervisor’s harassment of a subordinate if the employer proves (1) the harassment did not result in a “tangible employment action” against the employee; (2) the employer’s actions to prevent and correct harassment were reasonable; and (3) the employee’s actions in seeking to avoid harm were unreasonable. In *Agusty-Reyes v. Department of Education of the Commonwealth of Puerto Rico*, the U.S. Court of Appeals for the First Circuit provided guidance on each area.

Olga Agusty-Reyes was a non-tenured teacher who alleged that between August 2005 and January 2007, her supervisor made sexual advances towards her, which she rebuffed. During that time, the supervisor did not evaluate Agusty-Reyes’s performance, and she was not awarded tenure until after she began reporting to another supervisor who evaluated her performance.

Agusty-Reyes was unaware that her employer, the Puerto Rico Department of Education (DOE), had an harassment policy under which employees could file complaints with an internal investigation office. Accordingly, she initially complained about harassment to her supervisor’s supervisor, but the DOE did not investigate.

In January 2007, Agusty-Reyes filed a complaint with the investigation office. The DOE transferred the supervisor and conducted an investigation, which consisted primarily of a hearing in which the supervisor was allowed to testify but Agusty-Reyes was not. Ultimately, the DOE took no action against the supervisor.

Agusty-Reyes subsequently sued the DOE, reasserting her supervisor’s alleged harassment. The DOE moved for summary judgment, first arguing that the supervisor’s harassment had not resulted in a tangible employment action because Agusty-Reyes had not been terminated or demoted. The First Circuit rejected this argument, holding that the supervisor’s failure to evaluate Agusty-Reyes while she refused his purported advances could have resulted in a tangible employment action—a delay in awarding her tenure.

The DOE also argued that its actions to prevent and correct the harassment were reasonable, citing its policy and its prompt investigation after Agusty-Reyes filed a complaint with the investigation office. However, the First Circuit found that the policy could not shield the DOE from liability because it failed to communicate the policy to Agusty-Reyes. The First Circuit also rejected the DOE’s argument that the investigation was reasonable, citing the fact that the DOE did not permit Agusty-Reyes to testify at the hearing.

Finally, the DOE argued that Agusty-Reyes’s actions in seeking to avoid harm were unreasonable because she initially did not follow the proper reporting procedure. However, the First Circuit found that an employee need not follow a formal reporting procedure for the actions to be reasonable.

This decision illustrates the challenges that employers face in avoiding liability for a supervisor’s harassment. Employers should ensure that their harassment policies are disseminated to all employees and that company investigation mechanisms are thorough and balanced. Employers should also be cognizant of and responsive to complaints raised outside of the prescribed reporting channel. Finally, employers doing business in Massachusetts should be aware that defenses available under federal law may not be available for claims under Chapter 151B, and employers will generally be liable for sexual harassment by supervisors, regardless of the reasonableness of their preventive measures.

## Court Denies Class Certification in Discrimination Case Where Plaintiffs Sought Money Damages

In *DeRosa v. Massachusetts Bay Commuter Rail Company*, the District Court ruled that a group of plaintiffs failed to establish several requirements for class certification and denied their motion to pursue claims on behalf of a class of black and Hispanic employees of Boston’s commuter rail system, who alleged that the company’s promotional process was discriminatory.

Of the four preliminary elements necessary to establish that class certification is appropriate—numerosity, commonality, typicality, and adequacy of proposed representation—the commuter rail employees met only the numerosity requirement. As to the commonality, typicality, and adequacy requirements, the Court found that the statistical and anecdotal evidence the plaintiffs had offered was not persuasive and did not establish that black and Hispanic employees generally faced the same difficulties as those alleged by the named plaintiffs. In particular, the Court found that the plaintiffs lacked evidence of class-wide discrimination and their “general observations about workforce demographics” were insufficient to justify a class action.

The Court also found that several of the named plaintiffs' individual claims were not typical of the putative class because they were subject to unique defenses, which also made those plaintiffs inadequate representatives of the class that they asked the Court to certify. For example, one of the plaintiffs failed a drug-screening test, which made her ineligible for promotion, while another testified that it was her absenteeism, and not her race, which disqualified her from consideration for promotion.

In addition to the four necessary criteria, the procedural rule under which the employees moved for class certification applies only to cases in which the remedy that the plaintiffs seek is predominantly for injunctive relief—such as another change to the company's policies or procedures. Here, however, in addition to seeking a change in the promotional process, the employees sought compensatory and punitive money damages. Although the plaintiffs claimed that they would have brought the case even if no money damages were available, the very fact that they sought money damages prevented the Court from certifying the class. Therefore, even if the plaintiffs had succeeded in meeting the four certification requirements (which the Court found they did not), class certification would have been inappropriate under the rule that the plaintiffs invoked.

Given the Court's careful application of the class certification requirements, and its finding that a claim for money damages may prevent class certification in some discrimination cases altogether, this decision should prove helpful for employers facing lawsuits brought by plaintiffs who seek to assert claims on behalf of a class of employees.

## Table of Cases

*Agusty-Reyes v. Dep't of Educ. of Commonwealth of Puerto Rico*, No. 09-1247 (1st Cir. Apr. 6, 2010).

*DeRosa v. Mass. Bay Commuter Rail Co.*, No. 07-11824-MLW (D. Mass. Mar. 17, 2010) (Wolf, J.).

*Gonyou v. Tri-Wire Eng'g Solutions, Inc.*, No. 10-40011-NMG (D. Mass. May 25, 2010) (Gorton, J.).

*McLaughlin v. Nat'l Grid USA*, No. 07-40118-FDS (D. Mass. Mar. 31, 2010) (Saylor, J.).

*Tompson v. Dep't of Mental Health*, 76 Mass. App. Ct. 586 (2010).

Next *Massachusetts Employment & Labor Law Report*: **September 15, 2010.**

## Upcoming Breakfast Briefing

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