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Massachusetts Supreme Judicial Court Rules that Mandatory Treble Damages Statute is Not Retroactive

In *Rosnov v. Molloy*, the Massachusetts Supreme Judicial Court (SJC) held that a statute mandating automatic treble damages for most violations of the Commonwealth's wage and hour laws only applies to conduct occurring after its effective date of July 12, 2008. In so holding, the SJC refused to apply the amended treble damages statute retroactively, rejecting a position advanced by the plaintiffs' bar that mandatory treble damages should be available to plaintiffs for violations of the state's wage and hour laws even before the new law became effective.

Attorney Rosnov was briefly associated with the Law Offices of John Molloy. After resigning from Molloy's firm, Rosnov alleged that Molloy orally agreed to pay her referral fees which she never received and sued for nonpayment of wages. The Massachusetts Superior Court found Molloy automatically liable for treble damages pursuant to the July 12, 2008 amendment even though his alleged misconduct predated that amendment. Molloy appealed that holding and successfully petitioned the SJC for direct appellate review.

Molloy argued before the SJC that the amended treble damages statute could not apply retroactively for two reasons. First, prior SJC decisions held that statutory changes to parties' substantive rights can only be made on a prospective basis, whereas mere procedural or remedial legislation may apply retroactively. The SJC agreed that the amendment affected parties' substantive rights, holding that the amendment "effected a critical change in the language of the statute, removing the provision that treble damages 'may' be awarded, and replacing it with the directive that treble damages 'shall' be awarded." Noting that "only a potential for treble damages existed before," the SJC reasoned that the amendment affected defendants' substantive rights because it created a "marked increase" in liability. Molloy further argued that the amendment's legislative history bore

See "*Treble Damages*," page 2

Massachusetts Supreme Judicial Court Issues Ruling on Deductions from Wages and Timely Payment of Wages

In *Awuah v. Coverall North America, Inc.*, the SJC placed significant restraints on lawful deductions from wages and timely payment of wages.

The *Coverall* class action plaintiffs are individuals who entered into contracts with Coverall for the provision of commercial janitorial services to third-party customers. Those contracts included provisions in which the plaintiffs allowed several types of fees to be deducted from their pay, including franchise fees, fees for offsetting the costs of workers compensation coverage, and other insurance costs including comprehensive liability insurance. In addition, the plaintiffs consented in their contracts to "accounts receivable financing" whereby the Company paid the plaintiffs "interest fee advances" of the amounts billed to customers. If the customers did not pay their bills within ninety days, the employee was required to repay the employer for the amount of the advance.

In response to questions certified to the SJC by the U.S. District Court for the District of Massachusetts, the SJC held that an employer may not use accounts receivable financing systems to pay an employee at the time the customer pays the employer for the employee's work rather than when the work is performed, even with the employee's consent. Instead, the SJC held that wages are "earned" and due within a fixed period after the employee completes his or her labor, and not when the employer receives the customer's payment.

In addition, the SJC held that employers violate the Wage Act when they deduct the costs of worker's compensation and other work-related insurance coverage from an employee's pay, even if the employee consents to the deduction and still receives at least the minimum wage. The SJC held that the purpose of the Worker's Compensation Act would not be fully realized unless the cost of workplace injuries falls

See "*Deductions*," page 2

no indication that the legislature intended retroactive application. The SJC agreed, holding that language suggesting retroactive application was actually stricken from the bill before its enactment and noting that courts presume such “deletion[s] to have been intentional.” Noting that the legislature’s “intent on the retroactivity issue is murky” at best, the SJC found that Rosnov failed to present the “unequivocally clear” evidence of legislative intent necessary to support a finding of retroactivity given the marked change in substantive rights effected by the amendment. Employers defending Massachusetts wage and hour claims involving allegations prior to July 12, 2008, may now rely on this decision to reduce exposure. However, this decision does not insulate defendants from treble damages before the amendment became effective if the plaintiff proves that the employer’s conduct was “outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” *Wiedmann v. Bradford Group*, 444 Mass. 698, 710 (2005). For violations after July 12, 2008, the mandatory treble damages amendment will apply, subject to a possible constitutional challenge that the court in *Rosnov* did not reach.

squarely on the employer because the Worker’s Compensation Act makes such injuries part of the employer’s “cost of business.”

The SJC further determined that other insurance costs, such as those for comprehensive liability insurance, may not be passed on to employees. While employees can sometimes be liable to employers for property damage, such liability must only be assigned after the employee has received a “procedurally fair” adjudication of responsibility. “An employer may not deduct insurance costs from an employee’s wages where those costs are related to future damages that may never come to pass, and if they do, may not be the responsibility of the employee.” Similarly, employers may not lawfully deduct franchise fees from wages because such fees are “special contracts” in which employees purchase their jobs from employers and therefore violate public policy.

Employers should exercise caution in the aftermath of *Coverall*, as the scope of permissible deductions and the latitude on timely payment of wages are both significantly constrained by this decision.

Officers of Limited Liability Company Cannot Be Liable Under Massachusetts Wage Act

In *Cook v. Patient EDU, LLC*, a Superior Court Judge found that two managers of a limited liability company, including its president, were not individually liable under the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148 (Wage Act), for compensation allegedly due under an employment contract. In so deciding, the court differentiated officers of limited liability companies from officers of corporations, who are expressly subject to individual liability under the Wage Act. This decision on an issue of first impression shields managers of limited liability companies from individual liability under the Wage Act.

Peter Cook, a former Director of Business Development and Strategic Partner Development for Patient EDU, a limited liability company, filed suit seeking to recover salary, guaranteed draw payments, and travel expenses allegedly due to him under the terms of an employment contract. Cook also asserted a Wage Act claim against Patient EDU and two of its managers, one of whom served as the LLC’s president. The two managers moved to dismiss the claims against them, arguing that the language of the Wage Act, which provides that “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation” may be held liable as employers under the statute, excludes officers of a limited liability company.

The Superior Court agreed, stating that the two managers could not be liable under the statute because “an LLC is not a ‘corporation’ within the meaning of the [Wage] Act.” The court looked to the Massachusetts Business Corporation Law, Mass. Gen. Laws ch. 156D § 1.40(a), which defines the term “corporation” as “a corporation for profit ... incorporated under or subject to this chapter,” and determined that “a limited liability company is not a ‘corporation’ as that word is used in the General Laws.” The court further reasoned that, had the legislature intended for the statute to apply to limited liability companies, it could have used the term “entity,” which the Business Corporation Law defines to include both corporations and LLCs.

The Superior Court recognized the public policy arguments in favor of a single standard of liability for officers of limited liability companies and corporations, but determined that “where a statute is unambiguous, the court cannot insert therein a provision which the Legislature did not include, even if injustice or hardship results.” The court also remarked that it is the role of the legislature, and not the court, “to remedy the unfairness of which

[the plaintiff] complains by effectuating the necessary changes to the Act.”

While there are many cases holding that the Wage Act applies to a limited liability company, this is the first Massachusetts case to discuss the application of the Act to the officers of such an entity. In so holding, the Superior Court has provided officers of such entities with a strong weapon in their arsenal and provided yet another reason for entrepreneurs to adopt the limited liability structure.

Employees Not Protected by Wage Act For Wages Allegedly Earned After Their Termination

In *McQueen v. True Partners Consulting, LLC*, the Superior Court held that former employees whose employment agreements had expired were not “employees” under the Wage Act, and therefore could not recover damages for “wages” allegedly earned after their termination. In so deciding, the Superior Court affirmed that wages no longer accrue in the absence of an employment relationship and are not subject to recovery under the Wage Act.

True Partners Consulting, LLC hired Thomas McQueen and Joel Gross as Managing Directors in May 2007. When hired, each signed an employment agreement with True Partners. On January 19, 2009, True Partners informed McQueen and Gross that they had to either sign a new employment contract or sign a separation agreement. McQueen and Gross requested a separation agreement but did not sign it. In the absence of a new agreement and pursuant to the prior employment agreement, on January 31, 2009, True Partners terminated their employment. Nevertheless, McQueen and Gross continued to perform work for True Partners during the month of February, which resulted in a \$9,850 reduction in a credit balance for the company.

Because True Partners only paid McQueen and Gross for work performed through January, they filed suit to recover the “wages” allegedly earned after their terminations, alleging a violation of the Wage Act and a plethora of common law claims. True Partners filed a motion for summary judgment on all claims.

The Court granted True Partners’ motion for summary judgment with regard to the Wage Act claims. The Wage Act requires employers to pay terminated employees all wages earned in full on the day of discharge and subjects offending employers to a myriad of damages, including treble damages and attorneys fees. The Court based its decision on the fact that both McQueen and Gross had conceded that they were terminated on January

31, 2009 and failed to provide evidence to show that the parties created any other employment contract. Because they could not establish that they were “employees” under the Act, the Court found that they could not be owed “wages.”

Despite foreclosing recovery under the Wage Act, the Court found that True Partners could be liable for the post-termination “labor and services” under an unjust enrichment theory, since the efforts of McQueen and Gross had conferred a \$9,850 on True Partners.

This decision limits the application of the Wage Act to wages earned prior to discharge, even if the employee continues to provide labor and services to the employer, and cuts off recovery under the Act at the point the employment relationship is severed. Nevertheless, employers must be cautious, as plaintiffs may seek to recover damages for work performed after discharge under other legal theories.

First Circuit Rules No Individual Liability Under ADA, Allows Employee to Sue for Discrimination Under “Regarded-As” Theory

In *Román -Oliveras v. Puerto Rico Electric Power Authority*, the U.S. Court of Appeals for the First Circuit ruled that an employee with schizophrenia, who was removed from his job despite medical evaluations pronouncing him fit for duty, could sue his employer under the Americans with Disabilities Act (ADA) where he had established a plausible inference that he was discriminated against because his employer regarded him as disabled. Further, on an issue of first impression, the First Circuit ruled that the employee could not sue his two supervisors for disability discrimination under the ADA because the statute does not provide for individual liability against persons who are “not themselves employers.”

Héctor Luis Román-Oliveras worked as an electrician for Puerto Rico Electric Power Authority (PREPA) for 22 years without incident. Román alleged that in 2006 PREPA inexplicably removed him from his job and forced him to undergo a series of medical evaluations. Although each medical evaluation cleared him to return to work, PREPA continued to bar him from resuming his duties. Román sued PREPA and two of his supervisors for disability discrimination based on his schizophrenia, a condition he was diagnosed with before he began working for PREPA and for which he received regular psychiatric treatments. In his complaint, Román alleged that even though his doctors concluded that he was capable of returning to work, his employer still regarded him as disabled because he was schizophrenic.

Taking these allegations as true, the First Circuit concluded that Román had plausibly alleged that PREPA believed his schizophrenia substantially limited his ability to do his job, even though Román himself had not alleged any such limitation. The Court also concluded that the statutory scheme under the ADA is analogous to Title VII of the Civil Rights Act, which does not support claims of individual liability. Accordingly, the First Circuit affirmed the lower court's dismissal of the claims Román asserted against his supervisors. This ruling is consistent with decisions from other circuit courts that have held that the ADA does not impose individual liability on supervisors or co-workers.

This decision should remind employers that an employee does not need to show that he is disabled in order to proceed with a "regarded as" disability claim and further, that, at least under federal law, ADA claims may not be brought against individual supervisors or co-workers.

Massachusetts Appeals Court Finds Company Liable for Supervisor's Harassing Actions Outside of the Workplace

In *Cahill v. Silva*, the Massachusetts Appeals Court held that harassment occurring outside of work time and away from the workplace is actionable if it affects an employee's terms and conditions of employment or is otherwise sufficiently linked to the workplace. This decision serves as a reminder that an employer may be found liable for its employees' off-duty conduct.

Shortly after Daryl Cahill began working at Exodus Medical Transportation, he commenced a consensual sexual relationship with his direct supervisor, Christina Nelson. When the relationship deteriorated, Nelson threatened to fire Cahill, which prompted him to resume the relationship for several months. After the relationship ended a second time, Nelson vandalized Cahill's car and told him he should stop reporting to work. Over the ensuing weeks, Nelson left Cahill several voicemail messages detailing her plans to terminate his employment if he did not engage in sexual relations with her. Cahill reported Nelson's harassment to the Company's owner, Stephen Silva, who placed Cahill on leave pending the resolution of the issues with Nelson. Silva demoted Nelson and requested that Cahill return to work. Cahill refused and filed suit against the Company, Silva, and Nelson, alleging *quid pro quo* sexual harassment.

After a jury trial, but before jury deliberations commenced, the Superior Court granted the defendants' motion for a directed verdict. The case was dismissed, and Cahill appealed.

The Appeals Court found that Cahill presented sufficient evidence for a rational juror to find Nelson liable for *quid pro quo* sexual harassment. Noting that a plaintiff need not make a showing as to the severity or frequency of such harassment, the Appeals Court held that sexual harassment occurring outside of the workplace is actionable so long as it is work-related. Because Nelson's repeated threats to terminate Cahill's employment made a continued sexual relationship with her an implied term of Cahill's continued employment, the Appeals Court found that a reasonable juror could have found for the plaintiff and the Superior Court had improperly removed this issue from the jury by granting a directed verdict in Nelson's favor. Moreover, since a reasonable juror could find Nelson liable, the Company could be found vicariously liable for her actions as a supervisor, and the directed verdict in the Company's favor was also in error. However, the Appeals Court found that Cahill did not present sufficient evidence for a reasonable juror to conclude that Silva aided, abetted, or facilitated Nelson's actions, affirming the directed verdict in Silva's favor.

The Appeals Court's decision in *Cahill* serves as a reminder that the actions of supervisors outside of the workplace, including consensual relationships with subordinates, can result in liability. Employers are well-advised to implement and strictly enforce non-fraternization policies to help guard against such liability.

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