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## SJC Examines Grooming Policy and Orders Reasonable Accommodation

In *Brown v. F.L. Roberts & Co., Inc.*, the Massachusetts Supreme Judicial Court (SJC) vacated a trial court's grant of summary judgment to an employer in a religious discrimination case, ruling that the employee's request for an exemption from the company's grooming policy did not constitute an undue hardship as a matter of law. In vacating this decision, the SJC chose not to follow the First Circuit's decision in *Cloutier v. Costco Wholesale Corporation*, which held that employers were not obligated to provide a complete exemption from a grooming policy because it would prohibit the employer from controlling its public image and therefore constituted an undue hardship.

Bobby Brown, a practicing Rastafarian, worked as a technician in both the lower and upper bays of a Jiffy Lube service station. When Jiffy Lube initiated a new grooming policy in 2001, Brown informed his manager and assistant manager that he could not comply with the policy because his religion does not allow him to shave his face or cut his hair. Although Brown wished to continue his duties in the upper bay area where he interacted with customers, Jiffy Lube relegated him to the lower bay where he had no formal customer contact and less pleasant working conditions. In 2006, Brown brought a claim under Massachusetts General Laws ch. 151B (Chapter 151B) against the owner company of Jiffy Lube, alleging that its grooming policy was discriminatory.

The parties filed cross motions for summary judgment and the Massachusetts Superior Court found in favor of the employer. The trial court relied on the *Cloutier* decision to find that an exemption from the grooming policy would constitute an undue hardship for Jiffy Lube because it had a right to control its public image.

On appeal, the SJC reversed the trial court's decision, holding that when Brown made it clear that he was unable to comply with the policy for religious reasons, Jiffy Lube was obligated to engage in an interactive process to find a reasonable accommodation for him. The Court further held that an exemption from a grooming policy could never amount to an

*See "Grooming Policy," page 2*

## Court Interprets Retroactivity of the New Treble Damages Statute

A recent decision from the Massachusetts Superior Court interprets for the first time whether the new treble damages statute applies to cases that were pending when it was enacted on July 13, 2008. In an apparent win for employers, the Court held in *Pantano v. Artificial Life, Inc.* that the treble damages statute is not retroactive. This is welcome news for companies that have been waiting for clarity regarding the level of monetary exposure for wage and hour violations under the new law.

Robert Pantano worked for Artificial Life, Inc. from April 1995 until May 2001, when the company began to experience financial difficulties. As a result, the company laid off several employees, including Pantano. Pantano subsequently filed a claim in Superior Court for failure to pay wages. The Court granted Pantano's motion for summary judgment and determined that Artificial Life was liable for $62,895, but declined to rule on whether to award punitive damages. Pantano then moved for a summary judgment award of treble damages.

The issue before the Superior Court was whether to apply retroactively Chapter 80 of the Acts of 2008, which provides mandatory treble damages for violations of Massachusetts wage and hour laws. In its analysis, the Court noted that legislative acts do not apply retroactively unless "a statute explicitly states that it should" or "the context of the statute indicates the intent of the legislature for it to apply retroactively." Because Chapter 80 contained no explicit or implicit indication that the Legislature had this intent, the Court ruled against retroactive application. In a separate footnote, the Court also noted that applying this statute in such a manner would be inappropriate because specific language that would have indicated retroactivity was omitted from the final legislation.

While this unpublished trial court decision has limited precedential value, it is still likely to be persuasive with other courts addressing this issue and is therefore good news for employers facing wage claims under the new treble damages statute.

*"Grooming Policy," cont'd from page 1*

undue hardship as a matter of law, and reaffirmed that once an employee has made the required showing under Chapter 151B, the employer must show that any reasonable accommodation would cause undue hardship.

This decision demonstrates that despite the "public image" defense adopted in *Cloutier*, an employee's request for an exemption from a grooming policy does not relieve the employer of its obligation to engage in the interactive process and attempt to provide a reasonable accommodation. The SJC opined that it feared the misuse of the "public image" defense as an excuse for imposing discriminatory grooming policies on employees under the guise of "customer preference." Therefore, employers should be cognizant that rigid application of a grooming policy may lead to liability under Chapter 151B.

## Workers' Compensation Act Bars Lawsuit for Son's Death

In *Saab v. Massachusetts CVS Pharmacy, LLC*, the SJC held that the exclusivity provision of the Workers' Compensation Act, Massachusetts General Laws ch. 152, § 24, bars an employee's parents from maintaining an action against the employer where the employee's work-related injuries were compensable, even though no benefits have been paid to the employee or the employee's family.

Cristian Giambrone was an eighteen-year-old high school student employed at a CVS store in Boston. While at work in February 2004, Giambrone and other employees attempted to apprehend a suspected shoplifter. During the struggle, the suspect stabbed Giambrone in the neck, and he died at the scene shortly thereafter. Giambrone was financially dependent on his parents, Taciana Saab and Mark Giambrone. Because he died so soon after his injury and had no dependents of his own, Giambrone was not eligible to receive any workers' compensation benefits.

Giambrone's parents commenced a wrongful death action against CVS, seeking recovery for loss of consortium and punitive damages. CVS moved to dismiss the action, arguing that the exclusivity provision of the workers' compensation scheme barred the parents' claims, even though no workers' compensation benefits had been paid on Giambrone's behalf. A Superior Court judge granted CVS's motion to dismiss the tort claims, and the parents appealed.

The SJC affirmed the trial court's dismissal, holding that the determination of whether an employee's injury is compensable under the Act—and thus whether the exclusivity provision applies—does not turn on whether a claimant actually received compensation. Instead, the SJC explained, the exclusivity provision, which bars plaintiffs from seeking any other remedies against the employer, applies whenever the work-related injury is "compensable." Under the Act, a "compensable" injury is any "personal injury" that arises "out of and in the course of employment." Thus, the exclusivity provision applied to the circumstances of Giambrone's injury. Additionally, the SJC rejected the parents' argument that the provision violated their rights under Article 11 of the Massachusetts Declaration of Rights in depriving them of a remedy for the loss of their child. The Court did note, however, that its decision "may leave some injured workers or their families without a remedy."

This decision makes clear that the exclusivity provision of the Workers' Compensation Act shields employers from potential tort claims by an employee's non-dependent family members, even when benefits are not dispensed for the employee's work-related injuries. In exchange for the knowledge that work-related injuries will be compensated, an employee under the current scheme waives the right—and the derivative rights of his non-dependent family members—to sue for personal injury.

## Forfeiture Provision of Employee Stock Plan Does Not Violate Wage Act

The SJC recently held that the forfeiture provision of an employee stock plan, which required the surrender of all unvested company stock upon voluntary or involuntary termination of employment, did not violate the Massachusetts Payment of Wages Act (Wage Act), Massachusetts General Laws ch. 149, § 148. The SJC reached this conclusion in *Weems v. Citigroup, Inc.* after determining that the restricted stock made available to employees through the plan were not wages under the Wage Act.

The employee stock plan at issue consisted of three different programs: "bonus," "branch manager," and "payroll." Under the bonus and branch manager programs, certain employees were eligible for an award of restricted stock as a discretionary bonus. Under the payroll program, employees could elect to use a portion of their salaries to purchase restricted stock at a 25 percent discount. The stock acquired through all three programs was subject to a defined vesting period and to a forfeiture provision triggered by the employee's termination prior to vesting.

The plaintiffs, who voluntarily terminated their employment with Citigroup prior to the end of the applicable vesting periods, and thus forfeited their unvested stock, filed suit in the U.S. District Court for the

District of Massachusetts, alleging that the forfeiture provision violated the Wage Act by requiring employees to forfeit a portion of their earned wages. The District Court asked the SJC to clarify whether the restricted stock constituted wages within the meaning of the Wage Act.

The SJC concluded that it did not. As to the bonus and branch manager programs, the Court noted that an award of restricted stock was discretionary, Citigroup was not obligated to award any stock under the plan, and employees were on notice that the awards were subject to the vesting period. The SJC therefore concluded that the restricted stock under these programs was outside of the scope of the Wage Act.

The SJC also held that the payroll program was a bona fide employee stock purchase plan under Massachusetts General Laws ch. 154, § 8, which explicitly excludes from coverage of the Wage Act certain deductions from wages made by an employer at an employee's request, including deductions for the purchase of stock pursuant to an employee stock purchase plan. In reaching this conclusion, the Court assumed that, contrary to the plaintiffs' allegations, participation in the program was truly voluntary and benefits under the plan were not illusory.

The SJC's decision provides some guidance to employers offering employee stock plans, including those with forfeiture provisions. The decision suggests that bona fide employee stock purchase plans do not fall within the scope of the Wage Act provided they entail truly voluntary participation and non-illusory benefits to participants. The decision also confirms that discretionary bonus payments are outside the scope of the statute. In light of the now-mandatory treble damages under the Wage Act, employers should review their employee stock plans to ensure that the plans do not require employees to forfeit any earned wages.

## Superior Court Rejects Independent Contractor Status for Seasonal Delivery Driver

In *Amero v. Townsend Oil Company*, a Superior Court judge granted summary judgment in favor of Hughes Amero, a truck driver who claimed that he was incorrectly classified as an independent contractor, even though he provided his own truck, formed a corporation, and signed an independent contractor agreement. In this controversial decision, the Court found that Amero did not qualify as an independent contractor and that he was entitled to overtime pay, even though Townsend drivers are exempt from such payments under Massachusetts General Laws ch. 151, §1A(8).

Amero worked as a seasonal delivery driver for Townsend from 2000 through 2005. During its peak season, Townsend would classify some of its drivers as employees and others as independent contractors. While Townsend's drivers received hourly and overtime pay, the company's independent contractors received a flat rate of $0.09 for each gallon of oil they delivered, were ineligible for overtime, and were required to purchase their own trucks and insurance.

In January 2005, Amero injured himself at work. When Townsend refused to pay his medical and other expenses, Amero filed suit, alleging violations of the Independent Contractor Law and the Massachusetts Wage Law.

The Court found that Townsend improperly classified Amero from 2000 through 2004 because Townsend controlled his activities. In reaching this conclusion, the Court noted that Townsend required Amero to sign a non-competition agreement, paint the company's logo on his truck, and wear a company uniform. Given these facts, the Court found that Amero did not meet the applicable test to be an independent contractor.

For the work Amero performed from 2004 to 2005, the Court applied the new Independent Contractor Law and again concluded that Amero was not properly classified as an independent contractor. The Court found that Townsend could not possibly show that the services rendered by Amero (delivering oil) were outside the usual course of its business (oil delivery)—a requirement of the statute. The Court also declined to hold that Amero's incorporation of a motor transportation company qualified him for independent contractor status because, the Court concluded, it was a "mere shell corporation" established to limit Amero's liability and afford him tax savings.

In addition, the Court ruled that although Townsend's status as a motor carrier exempted it from paying overtime to its drivers, Amero was still entitled to receive overtime pay because Townsend had voluntarily paid overtime to its other employees. Without citing to any case law or statutory authority, the Court held that Massachusetts does not allow employers to offer overtime to some employees and avoid paying it to others by classifying them differently.

This decision highlights how difficult it is for businesses to use independent contractors effectively under Massachusetts law. Moreover, under this Court's reasoning, Massachusetts employers face potential liability whenever they choose to provide a benefit to certain employees beyond what the law requires. As a trial court opinion, however, it lacks precedential weight, so other courts are not bound by it.

## First Circuit Finds Bad Business Decisions Do Not Necessarily Constitute Shareholder Fraud

In *Day v. Staples, Inc.*, the U.S. Court of Appeals for the First Circuit held that whistleblower protection is not available to employees under the Sarbanes-Oxley Act (SOX) where there is no objectively reasonable belief that an employer has engaged in securities fraud. The Court found that allegedly inefficient corporate processes do not amount to shareholder fraud under SOX, and that employee complaints about such practices do not trigger SOX's whistleblower protection provisions.

Staples hired Kevin Day to work as an entry-level analyst in 2005. Shortly after he began work, he complained to his supervisors that Staples was processing customer returns improperly. His supervisors and other managers met with him to explain the reasons for its business practices related to returns and to assure him that the company was not engaged in any type of fraud. Despite these assurances, Day remained convinced that the conduct was unlawful. Staples later terminated Day for performance reasons unrelated to his complaint. Day then brought suit in District Court for whistleblower protection under SOX, breach of contract, and wrongful termination in violation of public policy.

The District Court granted summary judgment in favor of Staples, ruling that the SOX claim failed because Day's "belief that he had uncovered fraud was not reasonable." Day claimed that some company business practices related to the processing of returns resulted in manipulation of accounting information that defrauded shareholders and violated the code of ethics in Staples's employee handbook. SOX prohibits employers from retaliating against employees for providing information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation of [any of several enumerated laws] or any provision of federal law relating to fraud against shareholders." Here, the Court found Day's claims unreasonable because he lacked sufficient work experience to harbor a reasonable belief of fraud.

On appeal, the First Circuit held that "a company may legitimately decide that maximizing short-term profits is not its goal" and that "a complaint about corporate efficiency is not within the intended protection of SOX." The Court further held that a "'needless loss of revenue' is not a claim of fraud" and that even if an employee's complaints originally reflected a reasonable concern, such concerns may cease to be reasonable after the employer has explained the rationale for the processes.

The Court also rejected Day's state law claim that his termination constituted a breach of contract because Staples's code of ethics, which contains an anti-retaliation provision protecting employees who report legal or ethical violations to their supervisors, was an implied part of his employment contract. The First Circuit held that the code of ethics could not be considered part of the terms or conditions of his employment where other documents clearly indicated that he was an at-will employee and that the employee handbook containing the code clearly stated that it was not a contract of employment.

This case demonstrates that allegedly inefficient business practices do not necessarily constitute fraud. If an employer takes such complaints seriously and responds actively, it can provide a defense to whistleblower claims. This decision is significant in ruling that a stated code of ethics is typically not a contract under Massachusetts law. It provides further guidance to employers regarding the circumstances in which courts will consider policies included in handbooks or personnel manuals as part of an employment contract.

## New COBRA Subsidy in Stimulus Package to Benefit Involuntarily Terminated Employees

The American Recovery and Reinvestment Act of 2009 provides for a new subsidy of COBRA premiums for employees involuntarily terminated between September 1, 2008, and December 31, 2009. These "assistance eligible individuals" will only be required to pay 35% of their COBRA premiums with the remaining 65% of the premiums reimbursed through payroll tax credits to their former employers. The subsidy applies to premiums paid for periods of COBRA coverage beginning on or after February 17, 2009. It also offers employees who would otherwise qualify for the subsidy, but are not currently covered by COBRA, a second chance to elect coverage during a special 60-day election period. This new legislation will impact employers' ongoing COBRA obligations, including additional notice requirements regarding the subsidy and the special election period. Click on the link to review Seyfarth Shaw's Management Alert on this topic: http://www.seyfarth.com/MA021809/

## Table of Cases

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